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# THE LAW MAGAZINE.

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## ART. I.—HISTORY AND PRACTICE OF INJUNCTIONS.

THE distinction between law and equity has been clearly drawn in the judicial system of England for centuries. In other countries, the same judge has regarded considerations of equity as well as those of law; and the suitor's rights, upon whichever founded, have been finally determined in the same proceeding.

It was very natural that our peculiarity in this respect should give rise to a great deal of discussion; nor must we be surprised, if foreign writers, who have been accustomed to the union of the two jurisdictions, should generally give a preference to that system. At first this division produced a serious struggle—the assertion of independent common law authority by common law judges, and that of the superior powers of Courts of Equity by the holders of the great seal. The struggle, which commenced at a very early time, has broken out afresh at different periods; and the effect of it has been to make each party careful in defining the rules and maxims of its own tribunal. While the common lawyers have endeavoured to extend their authority by admitting, as far as they could venture, an enlarged application of legal rules; Courts of Equity have had recourse to precedent, by which they might prevent their authority from appearing arbitrary and capricious.

In early days, when the decision of a case turned entirely upon the opinion of an individual, or, as Selden observed, when all depended upon the length of the Chancellor's foot, the tribunal of course wore an arbitrary character: but as the jurisdiction advanced to maturity, the steady application of uniform principles and a perfect harmony of decision inspired the suitor with confidence, and created feelings of respect and approbation amongst the community at large. Thus the struggle between the two jurisdictions, somewhat un-



seemly at first, and inconsistent with the dignity of tribunals, has ultimately tended to render each of them more definite, effective, and satisfactory. Lord Bacon says, amongst his aphorisms, “*Apud nonnullos receptum est, ut jurisdictio, quæ decernit secundum æquum et bonum, atque illa altera, quæ procedit secundum jus strictum iisdem curiis deputentur; apud alios autem et diversis. Omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum, sed arbitrium legem tandem trahet.*”<sup>1</sup>

The cause of the separation has frequently been the subject of inquiry. We are not satisfied with the opinion of some writers, who attribute it exclusively to the love of arbitrary power displayed by our early monarchs; for, had this been the sole cause, the proceedings at law, as well as those in equity, would equally have been subjected to the caprice of the king's representative. When, however, we observe that proceedings at law have invariably been founded upon peculiar writs, and that those writs have always been framed upon certain definite principles, we see a reason, why the royal authority, when it ventured to interfere with the course of justice, would be inclined to abstain from the Courts of Common Law. The Court of the Chancellor existed in our earliest times. For a long period the judges, who sat in it, were not men of legal education. They could consult the wishes of the crown, without violating common law maxims, and show gratitude to the personage from whom their power emanated, without alarming the public mind. Under the name of equity they had the power of enforcing what they were pleased to recognize as the dictates of conscience; in other words, of giving complete validity to their own individual opinions.

On the other hand, the judges of the Courts of Common Law founded all their proceedings upon the writs which issued out of Chancery. All classes of the community were attached to common law rights. In vindication of such rights they sometimes took up arms. For this reason interference with the proceedings of the common law Courts, involving, as it did, danger to the prerogative, was not very frequently attempted. De Lolme observes:—“The power of the Courts of Equity in England, of which the Court of Chancery is the principal

<sup>1</sup> Bac. Works, vol. vii. p. 448; 1 Story's Eq. Jur. 28.

one, no doubt owes its origin to the power possessed by this latter, both of creating and issuing writs. When new complicated cases offered, for which a new kind of writ was wanted, the judges of Chancery, finding that it was necessary that justice should be done, and at the same time being unwilling to make general and perpetual provisions on the cases before them by creating new writs, commanded the appearance of both parties, in order to procure as complete information as possible in regard to the circumstances attending the case; and then they gave a decree upon the same by way of experiment. To beginnings and circumstances like these the English Courts of Equity, it is not to be doubted, owe their present existence.”<sup>1</sup>

It was natural that when application was made to the Court of Chancery in a case, which could not be provided for according to the principles on which writs were framed, the Court should assume the authority of doing justice. The exercise of this authority, by some person or another, was absolutely necessary. The monarch, or the Chancellor as his representative, was the person at whose hands relief was prayed: and, when we bear in mind that the inflexible character of the common law, and the national attachment to its maxims, rendered any extraordinary relief in Courts of Common Law quite unattainable, we cannot help thinking that the Chancellor assumed his jurisdiction upon such subjects simply because it was thrust upon him.

It is worth while to mention two or three events in our judicial history, in which the struggle between the two jurisdictions became peculiarly vehement. Cardinal Wolsey appears to have augmented the authority of the Court of Chancery to a very great extent:—“The jurisdiction of the Court,” says Mr. Reeves,<sup>2</sup> “was greatly enlarged during the time that Cardinal Wolsey presided there. He chose to exercise his equitable authority over every thing that could be a matter of judicial inquiry. At length, finding himself loaded with the number of petitions, often full of untrue surmises and frivolous complaints, he grew weary of attending to all these himself; and, therefore, as well for his ease at all times, as to provide

<sup>1</sup> See De Lolme on the English Constitution, edit. 1784, p. 144.

<sup>2</sup> Reeves's English Law, vol. iv. p. 368.

persons to supply his place when absent on political avocations, he caused four Courts to be erected by commission from the king. One of these was held at Whitehall; another before the king's almoner, Doctor Stokesby, afterwards Bishop of London; a third at the Treasury Chamber; the fourth at the Rolls before Cuthbert Tunstall, who was then Master of the Rolls, and used, in consequence of this appointment, to hear causes there in the afternoon."

As it was natural to expect in the arbitrary days of Henry VIII., the encroachments upon the common law courts immediately commenced. "The cardinal maintained his equitable jurisdiction with a high hand; entertaining in one department or other complaints of almost every kind, and deciding with very little regard to the common law."<sup>1</sup> A conflict of course ensued. "This conduct in his judicial capacity furnished grounds of accusation against him, when articles were exhibited containing an enumeration of all this great minister's offences. He was charged with having examined many matters in chancery after judgment given at common law, and obliging the parties to restore what was taken under execution of such judgments. He was accused of granting injunctions without any bill filed; and when those would not do, of sending for the judges and reprimanding them."<sup>2</sup>

It will be observed, that the accusation levelled against the cardinal was founded upon the notion not that he was corrupt, but that he was guilty of overruling the common law. His conduct was held to be at variance with the law of Magna Charta, "*nulli negabimus justitiam*," and still more with the following statute passed in the reign of Edward III.<sup>3</sup> "First, we have commanded all our justices, that they shall henceforth do equal law and execution of right to all our subjects, rich and poor, without having regard to any person, and without omitting to do right for any letters or commandment, which may come to them from us, or from any other, or by any other cause. And if that any letters, writs, or commandments, come to the justices or to other deputed to do law and right according to the usage of the realm, in disturbance of the law or of the execution of the same, or of right to the

<sup>1</sup> Reeves's English Law, vol. iv. p. 369.

<sup>2</sup> Ibid. p. 369.

<sup>3</sup> 20 Edw. 3, c. 1.

parties, the justices; and other aforesaid, shall proceed and hold their courts and processes where the pleas and matters be depending before them, as if no such letters, writs or commandments were come to them; and they shall certify us and our council of such commandments, which be contrary to the law as afore is said."

The business in the Court of Chancery during the administration of Sir Thomas More, who was the successor of Cardinal Wolsey, became far less extensive than it had been, while his predecessor remained in office. Still Sir Thomas More did not escape the animadversion of the common law judges. The event gave rise to a scene, of which Mr. Reeves gives the following account. "Sir Thomas More,<sup>1</sup> being informed that the judges had expressed their disapprobation of the injunctions he had granted, caused a docket to be made of every injunction, and the cause of it, which he had granted, while he was chancellor; and inviting all the judges to dine with him in the Council Chamber at Westminster, he introduced the subject after dinner; when, upon full discussion of every one of them, the judges confessed that he could have acted no otherwise. He then offered that if the judges of every Court, to whom it more especially belonged from their office, to reform the rigour of the law, would, upon reasonable consideration, by their discretion, and as he thought they were in conscience bound, mitigate and temper the rigour of the law, no more injunctions should be granted by him. To this they would make no engagement; upon which he told them, that as they themselves forced him of necessity to issue injunctions to relieve the people's injuries, they could no longer blame him. We are informed that afterwards, in a confidential conversation, he accounted for the backwardness of the judges in the following manner: That they saw how, by the verdict of a jury, they might transfer all difficulties and odium from themselves to the jurors, which they considered as their great defence and security; whereas the chancellor was obliged to stand alone the assault of every malignant observation."

The struggle between the two jurisdictions remained unde-

<sup>1</sup> Reeves's History, vol. iv. p. 376.

cided till the times of James I. It was then brought formally under the cognizance of the king himself, and was finally decided by him under the advice of some of the most learned counsel of the day. Lord Bacon and Yelverton took the side of the Court of Chancery; Lord Coke that of the Courts of Common Law. The part which Lord Bacon took, is open to this observation, that, at the moment when he was tendering his opinion, he was anticipating the immediate death of Lord Chancellor Ellesmere, whose vacant seat he expected to occupy.

The question was raised by two indictments<sup>1</sup> preferred for a *præmunire* against suitors who had sued in chancery after judgment had been given at common law. It appears that not only the suitors, but also their attornies and counsel, are charged with the offence. The indictment was framed under 27 Edw. 3, c. 1.

The difference of opinion which prevailed amongst the judges, and the general importance of the question, rendered it necessary to obtain the interposition of the highest authority; and when the king was required to put an end to the dispute, he asked the advice of some of his principal counsel, by submitting to them a case, which was to the following effect.

“A. hath<sup>2</sup> a judgment and execution in the King’s Bench or Common Pleas against B. in an action of debt of 1000*l.*; and in *ejectione firmæ* of the manor of D., B. complains in the Chancery to be relieved against these judgments, according to equity and conscience, allowing the judgment to be lawful and good by the rigour and strict rules of the law, and the matter in equity to be such as the judges of the common law, being no judges of equity, but bound by their oaths to do the law, cannot give any remedy or relief for the same, either by error or attain, or by any other means.

“Question, Whether the Chancery may relieve B. in this or such like cases, or else leave him utterly remediless and undone: and if the Chancery be restrained herein by any sta-

<sup>1</sup> Bacon’s Works, vol. v. p. 375.

<sup>2</sup> Reports in Chancery, vol. i.—“The Jurisdiction of the Court of Chancery vindicated.”

tute of *præmunire*, then by what statute, and by what words in any statute is the Chancery so restrained, and conscience and equity excluded, banished and damned?"

The counsel advised the king, that in cases of this description the Court of Chancery was empowered to give relief: the king gave his decision in conformity with this advice, and thus established the jurisdiction, which has continued in full force up to the present day.

We strongly recommend any one, who takes an interest in the question, or who is desirous of understanding the true character of the jurisdiction of the Court of Chancery, to read the account of this event which is contained in the Reports in Chancery. The counsel, in giving their opinion, explain the true character of the common law;<sup>1</sup> discuss the authority of the chancellor, and show that his office existed even in the Saxon period of our history. They also make a careful examination of the statutes quoted against the jurisdiction, with a view to show that the clauses which they contain are altogether inapplicable to the subject. Throughout the whole of the discussion there is a perfect concurrence in one particular principle, namely, that when a Court of Equity interferes with legal rights, it shall interfere only just so far as to give effect to equitable rights. The equitable jurisdiction leaves that of common law untouched. It interposes only that it may assert peculiar claims, which fall within its own cognizance, and not within that of common law: *Nusquam decurritur ad extraordinarium, sed ubi deficit ordinarium.*<sup>2</sup>

Such is the principle which was recognized in the time of

<sup>1</sup> The term "common law" is thus accounted for. "When the Saxons had conquered a great part of this island, and had set up several kingdoms in it, and had several laws whereby those kingdoms were governed, as the West Saxon law, the Mercian law, the Northumbrian law, and afterwards the Danes prevailing, set up their laws, called of them the Danish law. These several kingdoms coming to be united, and the name of England given unto this kingdom by them, and afterwards Edward (called the Confessor) being sole king thereof, caused one body of law to be compiled out of those several laws, and did ordain that those laws (of his) should be common to all his subjects; and in those laws of King Edward the Confessor that term of common law first began with us, being called common in respect of those several people that before lived under several laws, to whom those laws were now common; though in respect of the author they were called King Edward the Confessor's Laws."

<sup>2</sup> 4th Inst. 84.

James I., as constituting the limit of equitable jurisdiction. It is no slight evidence of consistency in the doctrines which prevail in Courts of Equity, that upon this same principle the recent decisions of Lord Cottenham in cases of injunction are distinctly founded. The great importance, which he attaches to the subject, will be at once perceived in the following extract from his judgment in *Brown v. Newall*.<sup>1</sup> "I am most unwilling to lay down any rule which should limit the power and discretion of the Court as to the particular cases in which a special injunction should or should not be granted: but I have always felt, and since I have been upon the bench, I have seen no reason to alter my opinion, that extreme danger attends the exercise of this part of the jurisdiction of the Court, and that it is a jurisdiction which is to be exercised with extreme caution."

Let us first consider the common instance of injunction granted against the trial of an action, until after discovery has been obtained in a Court of Equity. There the question is, whether the discovery sought is necessary for the fair trial of the action. A Court of Law does not compel one suitor to inform the other what he personally knows concerning the matter at issue. But it is a doctrine of a Court of Equity, that where two parties are in litigation, each shall have the power of examining the other as to all the information which he possesses of his adversary's title. Where the proceedings take place altogether in equity, the object is attained on either side by bill and cross-bill. Where they commence at law, either party may at once file his bill for discovery, and have legal proceedings stayed until the answer has come in. Thus while there are legal rights to be satisfied at law, there is also an equitable right, namely, the right of each suitor to the discovery of so much evidence in support of his own title as is known to his adversary. To all these different rights effect is to be given. As the value of the equitable right will be entirely lost, if the discovery is not given before the trial takes place, the trial is stayed; or, in other words, the satisfaction of the legal right is suspended in the mean time. Still it is suspended only for so long a time as may be required for the attainment of the equitable right; for as soon as ever

<sup>1</sup> 2 M. & C. 570.



the discovery has been given, the trial proceeds without further interruption.

In some cases an injunction is prayed against an action until after some relief has been afforded in equity; for example, an account. *Rawson v. Samuel* affords a good instance for the examination of equitable doctrines upon a case of this kind. There the plaintiffs at law brought their action against the plaintiffs in equity for breach of their contract to accept certain bills: whereupon the plaintiffs in equity filed their bill for a discovery and for an account of the general transactions between the parties. Lord Cottenham stayed the action till the discovery had been given. Afterwards it was asked that the actions should be further stayed till after the account had been given. His lordship then entered fully into the circumstances of the case, and examined the several points to be tried in the action, that he might see whether the relief ought of necessity to precede the trial:—

“The application<sup>1</sup> now is, that the trial of the action may be postponed until the account itself shall have been taken; and for the purpose of showing that there is some equity to suspend the trial, two of the pleas, and two only, have been referred to. The first is that which alleges that the plaintiffs were not bound to accept bills, when the balance was against them, and that there was such balance still due. Now upon that plea the issue denies that it was part of the contract that the liability to accept should be limited to the cases in which the balance was in favour of the plaintiffs. It is quite clear that the account has nothing to do with that. The next plea is that in which it is pleaded that the defendant charged higher prices for the goods than he ought to have charged under the agreement, and that by so doing he obtained from the plaintiffs acceptances for a larger sum than by the contract he was entitled to ask for. If that be proved, and be an answer to the action, it must be so independently of the result of the account, which cannot possibly be material to the trial of that issue. Then why is this Court to interfere with the trial of the action? This Court has no jurisdiction over the subject-matter of the action: it cannot try the damage sustained by the breach of the contract: that must at some time, in some shape or other,

<sup>1</sup> *Rawson v. Samuel*, 1 Cr. & Ph. 169.



become the subject of investigation at law; and, the answer being sufficient, the parties have now got all the discovery they can get from their opponents: the discovery is now complete. Not only therefore do I not see any reason for interfering with the trial, but I do not see what right the Court has to interfere with it, or what jurisdiction it has to prevent a party, who claims a right to damages for a breach of contract, from proceeding to establish that claim in the only way in which it can be established, namely, by an investigation before a jury."

It will be observed, that this was a case in which all the defences which could be raised by the plaintiff in equity, were defences which would be determined in a trial at law. There are, however, other cases in which a part of the defence belongs to a legal and a part to an equitable tribunal: for instance, in *Barnard v. Wallis*. The action at law was an action of trespass. The defence was threefold: first, licence from a third party: secondly, licence from the plaintiff at law: thirdly, acquiescence. The two first defences were purely legal. The third was a question for a Court of Equity. Lord Cottenham thus states the practice of the Court applicable to this class of cases: <sup>1</sup>

"I apprehend, however, that it is the course of the Court, where the question depends partly on a legal title, and partly on an equity, which will arise only in the event of that title being decided in one way, either to require that the party applying to the Court for its interposition should admit the legal right of the other party, as in the case of giving judgment in ejectment, which is the common instance, or if circumstances are not such as to enable him to do that, then to allow the action to go on, in order that the legal rights of the parties may be first ascertained, and that he may then come to this Court to apply those legal rights. This I apprehend to be the regular course of proceeding; and it is a very wholesome practice. It occasions no loss of time, and it has moreover this good effect in a case like the present, where the plaintiff in equity is in possession of the easement in dispute, that, if the parties come back to this Court after the trial at law, I shall then know what amount of damages has been assessed, and shall have an

<sup>1</sup> *Barnard v. Wallis*, 1 Cr. & Ph. 90.

opportunity of securing in Court that which at law shall have been decided to be a full compensation for the easement; whereas at present I have no means of fixing upon any sum to be paid into Court."

Thus, Lord Cottenham allowed the parties to settle the question between them, so far as they were fit for a legal tribunal, and reserved to himself the decision of the equitable question at some future time, in case it should ever become necessary. It was quite possible that the defence, founded upon acquiescence, might terminate the action as decisively as the defence founded upon licence. But the doctrine of acquiescence was not to be introduced, unless the defence by licence had proved to be unsuccessful. The entire proceeding was, if possible, to be confined to law; the party claiming the equity was not to turn it to account until after he had ascertained that his position in a Court of Law was altogether untenable.

We may, however, mention another case in which acquiescence has produced far greater effect; a case, on which we shall speak at some length, as, with the exception of two old cases, it is a case of the first impression, and holds out to all persons a very important warning not to sleep upon their rights.

It has been frequently decided,<sup>1</sup> that a party having an equity loses that equity as against another person, by permitting him to go on dealing with property in ignorance of such equity; that is, if A. is erecting works which are calculated to be a nuisance to B., and B. watches him in the progress of the work, and never asserts an equity which of right belongs to him to prevent the completion of the work, he will not be allowed to assert it after he has permitted A., without giving him any notice or warning, to incur vast expense.

The case of *Williams v. Jersey* advances one step further. There the laches of B. not merely destroy any equity which he might have originally possessed, but actually confer upon A. an equity which he would not otherwise have possessed. The Duke of Beaufort had obtained a piece of land from Lord Jersey, by making an exchange. Some question was raised, whether, at the time at which the exchange was made, distinct

<sup>1</sup> *Williams v. Jersey*, 1 Cr. & Ph. 96.

notice was not given to Lord Jersey that the object of the duke in making the exchange was to erect copper works upon the land which he thus acquired. But the judgment was given without reference to this point. The question decided was upon Lord Jersey's omission to give notice of his equity. He had brought his action against Mr. Williams, the lessee of the duke, after the works had been erected at vast cost and inconvenience, with his full knowledge and without any interposition on his part to put a stop to them. Lord Cottenham, referring to the effect of laches which he had previously mentioned, explained the point then to be decided, in the following terms :<sup>1</sup>

“Certainly it is a difficult question whether such an omission could give the adverse party an equity to prevent the party concealing his right, or apparently acquiescing in the nuisance, from asserting his title at law to compensation for the nuisance when effected.”

Two cases, and only two, were mentioned as precedents on which the lord chancellor might issue the injunction. The report of them may be fully stated, as it lies within a very small compass :<sup>2</sup> “A. diverted a watercourse, which put B. to great expense in laying of sooths, &c., and the diversion being a nuisance to B., he brought his action ; but an injunction was decreed upon a bill exhibited for that purpose, it being proved that B. did see the work when it was carrying on, and connived at it, without showing the least disagreement, but rather the contrary. *Short v. Taylor*, in Lord Somers's time, was cited, which was,—Short built a fine house ; Taylor began to build another, but laid part of his foundation upon Short's land. Short seeing this, did not forbid him, but on the contrary very much encouraged it ; and when the house was built, he brought an action ; and Lord Somers granted an injunction, and said it was but just and reasonable ; for being a nuisance, every continuance is a fresh nuisance, and so he would be perpetually liable to actions, which would be hard when he was encouraged by the party himself.” Lord Cottenham considered these cases as distinct authorities upon the case before him. “I think,” he said, “it is impossible after those two cases to say that a party may not so encourage that which he

<sup>1</sup> *Williams v. Jersey*, 1 Cr. & Ph. 97.

<sup>2</sup> 2 Eq. Cas. Ab. 522.

afterwards complains of as a nuisance, as not only to preclude him from complaining of it in this Court, but to give the adverse party a right to the interposition of this Court in the event of his complaining of the nuisance at law." The case came on upon demurrer, which he over-ruled upon these considerations.

The class of cases to which we shall next advert is one, in which all the questions arising in the suit at law are of purely legal cognizance, but there are certain collateral circumstances, which render it improper, according to the notions of a Court of Equity, that the plaintiff at law if successful should enjoy the fruits of his action. This is precisely the case, which was submitted for the decision of King James the First. It was raised in *Rawson v. Samuel*: where the plaintiff in equity alleged a right of set-off, as a reason why the plaintiff at law, though he might be entitled to succeed in his action for breach of contract, still ought not to be permitted to recover damages.<sup>1</sup> It is a species of injunction of the most frequent occurrence. The equity, upon which it is founded, is one which admits the demand at law to be valid, so far as law is concerned. For this reason the order is not issued, unless the plaintiff in equity is willing to put the plaintiff at law in the situation, in which he would have stood, if the trial had proceeded and had ended in his success. The plaintiff in equity is therefore desired to give judgment at law, and to bring the money claimed into Court. Whether he or his opponent shall take it out of Court, will depend upon the decision, which may be made upon the equity reserved.

There is a great difference between those cases in which the equity alleged raises such a defence to the action as the acquiescence which has been mentioned, and those in which it destroys the ground of action altogether. In the former class it is in the nature of a plea which confesses and avoids; in the latter it resembles the general issue. An instance of the latter description is to be found in *Miltoun v. Stewart*.<sup>2</sup> The action was brought upon a bond. The equity of the defendant at law was that the bond was a gambling debt. Lord Cottenham said,<sup>3</sup> that the statements in the answer

<sup>1</sup> *Rawson v. Samuel*, 1 Cr. & Ph. 170.

<sup>2</sup> 3 M. & C. 24.

<sup>3</sup> *Ibid.*

were amply sufficient to raise such a degree of doubt with respect to the consideration, as to entitle the Court to prevent the action from at present proceeding. With reference to the argument, that the injunction ought to have been granted only upon the terms of paying the money into Court, his lordship said it was very true, that, if there be a legal debt, and only some equitable circumstances, upon which the injunction is sought, the Court will not allow the debtor to retain the money in his own hands; but here the question was, whether there was a debt at all. His lordship was of opinion that the action should not be permitted to go on, until the case should be in that state, in which the Court could come to some conclusion as to the rights of the parties."

This was an instance in which a party would have been deprived altogether of his equitable right, if the legal right had ever been brought forward. We have seen that in other cases the equitable right was subsequent to the legal right, in the place which it occupied. Here it took precedence, not from any superiority of one class of rights over the other, but simply because in the nature of things, the inquiry, whether there is any demand at all, takes precedence of the inquiry, whether, if there is a demand, it can be met by any kind of defence.

This is a proper place for the introduction of some remarks upon injunctions issued in an interpleader suit. They are founded upon this principle, that one man ought not to be vexed by legal proceedings, instituted about matters in which he makes no claim and has no interest. A. admits that the money, which he holds, does not belong to him. He is prepared to give it up. He dares not give it to B., who brings the action against him, because he is threatened by C. with a similar assertion of title. The dispute then lies between B. and C. In the eye of a Court of Equity, it is against conscience, that A. should be exposed to litigation on their account. For this reason the action is stayed. Still A. is not allowed, under cloke of any equitable right, to gain any personal advantage, or to produce any additional inconvenience to either of the claimants, by keeping the money himself. That evils of this kind may be avoided, and also, that the money may be placed in security, he is ordered to pay the

money into Court. Thus the equitable right of A. prevails so far as to relieve him from all litigation : while the several legal rights of B. and C. are so far respected, that the fund is taken out of his hands and put into a place of safety, to remain there until the title to it has been duly determined.

Such is the object of the proceedings which take place by way of interpleader. Still there is a hardship in them. They prevent the party, who really is entitled, from taking possession of his property. They check the claimant, who shows the greatest activity in the assertion of his supposed rights. They prevent him from being possessed of the property, to which as against the temporary holder he has a complete title. "The proceeding by interpleader," says Lord Cottenham, "although very necessary for the protection of a party upon whom two inconsistent claims are made, is undoubtedly in many cases, a severe proceeding against the person who is in fact entitled. He is in the course of establishing his legal right and recovering a debt or duty due to him, when this Court intervenes and deprives him of the means of establishing that legal right, because some other person, who appears ultimately to have no title at all, gives this Court jurisdiction by way of interpleader, by setting up a claim ; and I think it would not be expedient to lay down any rule or adopt any practice by which parties entitled to an interpleader would be much encouraged to come here ; because it is much more beneficial to the parties really interested in the debt or duty, if their own proceedings are such as to bring the claims between them to an issue, and that that object should be obtained without a bill of interpleader." Thus in respect of interpleader suits, we find in Courts of Equity the same unwillingness to interfere with legal rights that has appeared in other cases of injunction, and the same determination on the part of judges to confine their jurisdiction within the narrowest limits, which have been assigned by Courts of Equity to orders of injunction.

The Court of Equity is not contented with the exercise of great caution in the issue of orders of injunction ; it takes still more active measures, with a view to prevent its interposition from doing injury to parties in their legal rights. However strictly circumstances may be sifted, and however care-

fully the terms of an injunction may be worded, occasions will now and then arise, in which parties will be injured by the sudden interruption of their legal proceedings. We shall find that in these instances the Court interferes actively to compel the party, who has gained advantage in this manner, to give compensation to his adversary. A defendant prevented by injunction from compelling payment of an annuity, loses the enjoyment of the successive payments as they accrue. As a compensation for the loss, he is decreed to receive interest.<sup>1</sup> Another example is found in a case which is shortly reported in the following words:<sup>2</sup> "If a suit be in Chancery for a debt for rent by lease, parol or simple contract, and beginneth within time of limitation, and he dismiss after the time of limitation, the Court will not order the defendant to take no advantage of the Statute of Limitations, see *Boscoven and Boscoven's case*; but if in such suit the party be stayed by act of the Court, as by injunction, &c., it is otherwise, for the act of the Court shall do no prejudice, as in case of demurrers at common law." An instance of the same nature is where an obligee sues at law for principal and interest, at a time when they are below the amount of the penalty, and is restrained from his action until a later period, when they exceed the amount of the penalty. A decree will then be made for the entire sum<sup>3</sup> that is due. In a similar manner, if a landlord has been prevented from recovering his premises by ejectment, a decree will be made in his favour for the payment of a sum of money in the nature of mesne profits.<sup>4</sup> Lord Cottenham states the general principle in the following terms. "The head of equity, to which I allude, is, that where by the interposition of the Court to prevent an act rightfully or wrongfully intended, the defendant has lost a remedy at law, the Court will give him a remedy equivalent to that from which the interposition of this Court has debarred him."<sup>5</sup>

<sup>1</sup> *Morgan v. Jones*, 2 Dick. 644; *O'Donnel v. Brown*, 1 Ba. & Be. 262.

<sup>2</sup> *Chan. Cas.* 2, 217.

<sup>3</sup> *Pulteny v. Warren*, 6 V. 79; *Duval v. Terry*, Show. P. C. 15; *Grant v. Grant*, 3 Russ. 607; 3 Sim. 340.

<sup>4</sup> *Pulteny v. Warren*, 6 V. 79.

<sup>5</sup> *Brown v. Newell*, 2 M. & C. 572.



In looking through the cases upon injunctions against proceedings at law, especially those in which Lord Cottenham has brought into view the principles upon which the system rests, it has occurred to us that the practitioner, who is consulted upon questions of injunction, may, with great advantage to himself, adopt inquiries of the following character. First, whether there is any equity against the legal demand. Secondly, whether there is any equity for a discovery of evidence to be used at the trial. Thirdly, whether there are any equitable defences to the action. Fourthly, whether, if the action proceed to judgment, there are any equitable circumstances upon which execution may be resisted. We need hardly say, that the record must be framed in such a manner as to support the prayer for that particular species of injunction, which is justified by the circumstances of the case. In the first place, the object is altogether to prevent the trial at law. In the second, to prevent the trial before discovery has been obtained; and in the third and fourth cases to prevent the plaintiff at law from enjoying any fruit from his legal proceedings, until there has been an opportunity of discussing the merits of the equity, which is alleged against him. All the different equitable considerations on which proceedings at law are arrested, may, we believe, be classed under one or another of these several heads of injunction; but, unless the distinctions between them are carefully observed, proceedings by way of injunction cannot be taken with safety, or with any prospect of success.

The principle, upon which the common injunction is obtained, may be deduced from the authorities which have been already quoted. This order is obtained, as of course, if the defendant in equity does not plead, answer or demur within eight days after appearance. If it is obtained before proceedings at law have been commenced, it prevents the party enjoined from commencing them; thus it keeps all things in statu quo. If it is obtained after the commencement of proceedings at law, it prevents the plaintiff at law from taking out execution: thus it interferes with the legal proceedings only just so far as to give the plaintiff in equity an opportunity of bringing his equity to a determination, before the damages, awarded in the action, have been recovered. Of course if the plaintiff in equity



were compelled to pay those damages, he would either be deprived of the benefit of his equity, or else he would be obliged to commence fresh proceedings to recover back the very damages which he has just paid. The plaintiff in equity, having had the advantage of keeping things in statu quo to this extent, must in the next step argue the case upon the merits, as disclosed either in the answer or in affidavits. Upon this argument he obtains any further assistance by way of injunction, to which he establishes his right.

With respect to the difference in the effect of the common injunction, according to the time of its issue, before or after the commencement of proceedings at law, we may venture a suggestion, in the absence of all authority, that it arises either out of the fiction that a trial is concluded on the day on which it commences, or else out of a deference which the Court of Chancery shows to Courts of Law, in not arresting the proceedings which have been once entertained, unless, upon examination of the merits, such a step appears clearly to be called for. The latter supposition is strengthened by the ancient practice on the equity side of the Court of Exchequer, where the common injunction stayed not only execution but also the trial itself. It is probable that in early days the injunction was never obtained on the equity side of the Exchequer, except against proceedings on the plea side of the same Court. Over both branches of the Court the same Lord Chief Baron presided. Since, then, the Lord Chief Baron was only in the capacity of an equity judge restraining his own conduct in the capacity of a judge in common law, there was no room for the delicacy, which was felt by the Court of Chancery towards a Court of Common Law.

We have hitherto confined our attention to those injunctions which interfere with proceedings at law. They are the injunctions which, in former times, gave rise to controversy, and more recently to frequent misunderstanding. We will now briefly notice a few instances of injunctions of another character, for the purpose of showing that they are perfectly in keeping with the principle which we have mentioned. If manufacturers have by long usage established a *primâ facie* right to particular marks upon manufactured articles, and a

stranger assumes the mark, he will be restrained from using it, until he has established his right to do so in a Court of Common Law.<sup>1</sup> When there has been for a considerable time a general acquiescence in a patent, and a stranger invades it, he will be restrained from persevering in such an invasion, until he has impugned the validity of the patent in a Court of Law.<sup>2</sup> When a party has published a work, and a stranger publishes another work, which is alleged to be piracy, the second publication is restrained by the Court, until the conflicting rights have been determined in a Court of Law.

Instances of injunctions of this nature might easily be multiplied to any extent. We have quoted a sufficient number of them for the purpose of introducing a few remarks. In all such cases the claims of plaintiff and defendant conflict with each other; they are claims to be decided in a Court of Law. During the time which elapses before the trial takes place, one of the two parties must be injured; either the old claimant of the right, by interruption in the continuance, or the new claimant, by delay in the commencement, of the exercise of the right. In this dilemma the Court of Equity acts upon the principle of keeping things as they are. Effect is given to the old right, until there has been an opportunity of deciding the question before the proper tribunal. It must, however, be observed, that mere precedency in user of the right is not sufficient. The right, in order that it may be respected, must be the old established right. Lord Eldon's judgment in *Hill v. Thompson*, which has always met with approbation, is perfectly clear upon this point.<sup>3</sup> "The principle," he says, "upon which the Court acts in cases of this description is the following: where a patent has been granted, and an exclusive possession of some duration under it, the Court will interpose its injunction without putting the party previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday, and upon an application being made for an injunction, it is endeavoured to be shown in opposition to it, that there is no good specification, or otherwise that the patent ought not to have been granted, the Court will not, from its own notions respecting the matter in dispute, act

<sup>1</sup> *Millington v. Fox*, 3 M. & C. 351; *Bacon v. Jones*, 4 M. & C. 433.

<sup>2</sup> *Saunders v. Smith*, 3 M. & C. 711.

<sup>3</sup> *Hill v. Thompson*, 3 Mer. 624.

upon the presumed validity or invalidity of the patent, without the right having been ascertained by a previous trial; but will send the patentee to law, and oblige him to establish the validity of his patent in a Court of Law before it will grant him the benefit of an injunction." When the Court respects the right which has been admitted for some time past, it acts upon the principle of which Cicero speaks with approbation: "Consuetudinis autem jus esse putatur, id quod, voluntate omnium, sine lege, vetustas comprobârit. In eâ autem jura sunt, quædam ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, quæ prætores edicere consuerunt."<sup>1</sup>

Lord Eldon's language derives additional importance from the approbation with which it has been recently quoted by Lord Cottenham. Every case of this kind must be determined according to its own circumstances. The Court must judge whether the possession has continued long enough to establish a *primâ facie* right. Lord Cottenham observes:<sup>2</sup>—"But then it is said there is possession of the patent, and that possession of a patent for a certain length of time gives such a title as the Court will protect until a trial at law can be had; and certainly, if I found that manufacturers of piano-fortes had acquiesced, and that there was no doubt upon that point to which I have before referred, I should have adopted the course which Lord Eldon adopted,<sup>3</sup> and which I have followed, of protecting the right until the trial should have been had. For that purpose, however, I ought to have very satisfactory evidence of exclusive possession. Now I find here that certain manufacturers state, that they abstained from making piano-fortes in this manner out of respect for the plaintiffs, as having a patent; while other manufacturers again say, that they have always made them in this manner. Which of these statements is true I am not called upon to decide; but the discrepancy does throw sufficient doubt on the case to prevent my interfering by injunction." It will be observed that the object pursued, according to the expressions contained in these passages, is to give effect to that, which, so far as the case has been laid before the Court, is, in reality,

<sup>1</sup> Cicero, de Invent. lib. ii. cap. 22; Story, Eq. Jurisp. i. p. 17.

<sup>2</sup> Collard v. Allison, 4 M. & C. 488.

<sup>3</sup> Hill v. Thompson, 3 Mer. 622.

the legal right. "The jurisdiction of the Court," says Lord Cottenham, "is founded upon legal rights; the plaintiff coming into this Court on the assumption that he has the legal right, and the Court granting its assistance upon that ground."<sup>1</sup>

Such being the foundation of the Court's jurisdiction, the mode in which it is worked out, and the caution with which it respects the legal right, and interrupts the enjoyment of it for the smallest possible period, is admirably explained in the following passage:—<sup>2</sup>"When a party applies for the aid of the Court, the application for an injunction is made either during the progress of the suit or at the hearing; and in both cases I apprehend great latitude and discretion are allowed to the Court in dealing with the application. When the application is for an interlocutory injunction, several courses are open: the Court may at once grant the injunction simpliciter, without more—a course which, though perfectly competent to the Court, is not very likely to be taken, where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the Court according to the case made.

"When the cause comes to a hearing, the Court has also a large latitude left to it; and I am far from saying, that a case may not arise in which, even at that stage, the Court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right, and of the evidence by which it is established—these and other circumstances may combine to produce such a result, although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the Court, provided a case be presented, which satisfies the

<sup>1</sup> Bacon v. Jones, 4 M. & C. 436.

<sup>2</sup> Ibid.

mind of the judge that such a course, if adopted, would do justice between the parties.

“Again, the Court may, at the hearing, do that which is the more ordinary course ; it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of at once dismissing the bill.”

Another class of cases in which special injunctions issue, are cases in which the Court interposes to prevent a person from violating a contract. They are cases in which the defendant's conduct amounts to irreparable injury. A Court of Law would award damages, perhaps very high, in respect of his conduct. But the threatened injury is of such a nature that damages would in reality be no compensation to the plaintiff. For this reason the Court interposes, and forbids the defendant to fulfil his intentions until he has established his right to do so by a trial at law. For instance, a question frequently arises, whether the defendant has a right to break up the plaintiff's soil, or to cut down ornamental timber, or to destroy a bridge, or to dismantle a house. In these, and innumerable other instances, which may be quoted, the injury is complete, and is probably beyond all remedy, if the act is once done. In a Court of Law, there is no power of prevention: recourse is therefore had to a Court of Equity, and the hand of the defendant is stayed till there has been time to make the right to do the act a matter of legal determination. Whether in cases of this kind the Court will or will not interfere, depends upon circumstances which it is impossible to enumerate. There are, however, certain considerations which always appear to have great weight with the Court. Delay or activity in the plaintiff,—the apparent strength of his right,—his conduct towards the defendant,—or the *bonâ fide* character of his statements. In none of these cases does a Court of Equity decide upon the legal right. Either that right has been already determined, in which case it is enforced by equity implicitly following the law ; or else it is still under discussion, and the equity interferes merely to keep matters in statu quo, and to prevent irreparable damage in the interval between the commencement of the dispute and the legal determination. The most efficacious steps are taken to

prevent the legal right from being in abeyance during too long a period, as the parties are put upon terms to come to trial at the earliest possible moment.

In almost all cases of this kind, the interference itself produces an immediate evil. Suppose, for instance, that the works of a railway are stopped, what is to become of the numerous staff of workmen previously enlisted? Suppose a ship to be prevented from sailing, a vast commercial speculation may be thwarted. Scarcely any of those undertakings, which can be made the subjects of injunction, are so independent of times and seasons as not to be seriously injured if they meet with some sudden interruption. Yet if such interruption does not take place, the progress of the work may effect the very disaster, which, upon the trial taking place, will be proved to be at variance with legal rights. The tenderness with which the Court deals with this conflict of right is observable in the following expressions of Lord Cottenham;<sup>1</sup> “If I entertained more doubt than I do on this subject, I should be very much influenced by considerations similar to those which weighed with me in deciding the Liverpool case,<sup>2</sup> because, where the question is as to interposing by injunction to protect a right which in itself is doubtful or disputed, it cannot always be considered on which side the balance of danger preponderates. If the contract be a contract binding on the existing company,—and that is the question between the parties,—the plaintiff is not precluded from attempting to establish it. What the company are doing is to take part of the plaintiff’s land, under the powers of their act of parliament; and this, if done adversely against the plaintiff, will not preclude him, should he establish his right at the hearing, from compelling them to take the whole of his land under the contract. But if on the other hand the evidence were more doubtful than it is, the granting of the injunction in the meantime would certainly produce irreparable injury to the other party, in case it should ultimately turn out that the plaintiff has not that right which he asserts that he has. It cannot be supposed that the plaintiff should stop the defendant’s works until this cause shall have been heard. At the same time the company should be well aware that

<sup>1</sup> *Greenhalgh v. Manchester and Birmingham Railway Company*, 3 M. & C. 798.

<sup>2</sup> *Attorney General v. Mayor of Liverpool*, 1 M. & C. 171.

that would be no answer, if a claim can be established against them upon the contract. The case is only one, in which there being a doubt what the ultimate rights of the parties will prove to be, the Court is in infinitely greater danger of doing injustice by granting the injunction, than by refusing to grant it."

We may mention one other species of injunction, by which a party is prevented from availing himself of a contract or of a private act of parliament, on the ground that it has been obtained by fraud. This exercise of authority resembles the restraint of actions upon securities obtained by fraud. There is an equitable right nullifying the contract, and a legal right arising out of it. The former right will be absolutely lost if the latter is put in force.

But we have already filled the space which we can venture to occupy. For further investigation of the subject, we refer our readers to the several cases which we have mentioned. They are most of them cases decided by Lord Cottenham. We have preferred his decisions principally for two reasons : one, that we were desirous to show how the principle established in very early times has prevailed in the most modern cases ; the other, because in the judgments of Lord Cottenham principles are brought to light with peculiar clearness. His object in giving judgment always appears to have been, to elicit from preceding authorities the distinct principle, to explain it clearly, and then to apply it to the facts of the case before him. He could not have shaped his judgments in a form more practically useful. He has rendered them, by this means, not merely satisfactory adjustments of dispute for the suitors before him, but also beacons and landmarks, by which counsel may, in cases to occur in after times, determine what course to pursue. We may add, that the advantage of clear principle is more sensibly felt in cases of injunction than in any other cases, for these cases spring up at the moment. Advice must be given, the bill filed, and the application made to the Court with but little deliberation ; and, if principles and practice are not perfectly well understood, counsel may, without being guilty of either carelessness or ignorance, draw their clients into very serious difficulties.

We have endeavoured to trace an outline of this very peculiar branch of equity jurisprudence ; to mark the original



establishment of the leading principle, and the mode in which it is carried into execution at the present time. We have mentioned some of the conditions upon which this assistance is granted to suitors, and we have noticed the provident caution with which injury to the holders of legal rights is either prevented by anticipation, or else subsequently cured by a satisfactory compensation. We may now leave it as the last question for the consideration of our readers, whether this branch of the jurisdiction is to be approved of or condemned. Those, perhaps, who are accustomed to the notions and practice of Courts of Equity, may suspect themselves of some slight prejudice. Yet it must be remembered, that Courts of Law can award damages for an injury, but cannot prevent it. Is it not wholesome that a power of prevention be vested somewhere? Courts of Law can, when the trial takes place, determine the right: but in the meantime the subject of suit may be open to destruction by either party. Should there not be vested in some court the power of placing the property in safe custody? Again, let us bear in mind the different rights which persons may possess, rights legal or rights equitable. A. has complete legal title to an estate, but it was purchased with B.'s money. Ought A. to be permitted, in defiance of the relation thus constituted, to bring an ejectment against his cestuique trust? A. holds a bond, which he obtained fraudulently. His title at law is complete. He sues B. Is he to be permitted to proceed in his action, and to reap the profit of his fraud? A. has a claim against B. for a sum of money, but B. has an equitable claim in the nature of set-off. Is A. to receive the benefit of his action, and the set-off of B. to be disregarded? We might run through instances innumerable of different kinds of equity, in which it is clear that there must be litigation vexatious and unnecessary, and destruction of property, and disappointment of right, if there is not to be lodged in some one or more of the Courts of justice the power which is now exercised in Courts of Equity by orders of injunction.

*C.*

Since this article was written, an able treatise on the subject, by Mr. Drewry, has appeared.—*Edit.*



ART. II.—SCOTCH MARRIAGES—CASE OF BIRTWHISTLE  
v. VARDILL.

*The Case of the Ante Natus in Scotland claiming as Heir in England, being a Report of the Case of Birtwhistle v. Vardill.* By D. C. Moylan, Esq., of Lincoln's Inn, Barrister-at-Law. London, 1841.

It has frequently been observed, that if some of the events which occur in real life were presented for the first time in the pages of a novel they would be pronounced absurdly improbable, or, if related in an old history or chronicle, would throw considerable doubt upon its veracity. This would most certainly be the case, if the rules of law which affect marriage and the descent of real estate in England and Scotland were the subjects of consideration. Who, for instance, would at first credit the fact, and yet such it is, that England and Scotland, being but two districts of one and the same kingdom, and both governed by the same legislative authority, should still continue, not merely such a difference, but such a hostility of jurisprudence, that the same man should be in one kingdom legitimate son and heir to his father's real estate, and in respect of that heirship entitled not only to the real estate, but to his father's honours, so that he might absolutely vote as a Scotch peer in the election of Scotch peers, or sit as an elected Scotch peer in the legislature, assisting in giving laws to both countries, and should yet be incapable of succeeding to his father's real estate in England?

The case of *Birtwhistle v. Vardill* has now established that such is the law, and a marriage, therefore, in one part of the kingdom is not now permitted to produce its usual legal effect in the other, but just enough respect is paid to it to make the want of a complete respect the more marked and striking. The English law recognises the marriage law of Scotland so far as to admit the status it creates, but denies the consequences of that status. Like the governor of Baratania, at his promised feast, the Scotch law is treated with the utmost external deference, but the substantial proofs of its authority, the enjoyments that ought to accompany the rights it has formally recognised, are absolutely denied to it. The curious difference between the laws of the two countries that gives rise to this practical

contradiction in their administration will of course be made matter of blame imputable to one or other of them, according to peculiar opinions of each individual critic. On this subject we have already intimated our own sentiments,<sup>1</sup> nor has subsequent reflection in the least diminished, on the contrary, it has rather increased their force. But at present our task will be less directed to the consideration of the causes of this difference of law, or to the means of remedying it, than to a notice of the principles on which the English judges have proceeded in declaring, that an ante natus, legitimated by a Scotch marriage, cannot succeed to English real estate.

The subject is presented to notice by the recent publication of the Report named at the head of this article. Mr. Scott had already published the opinion of the judges and the speeches delivered by the lords on judgment being pronounced.<sup>2</sup> But in Mr. Moylan's publication we have the arguments of counsel presented to us, and in those attributed to Mr. Dampier will be found a fund of deep and curious learning, applied with great skill to the support of his particular line of argument. We cannot say that equal justice has been done to the argument of the late Attorney-general, nor are we favoured with even one word of that reply in which he sought with the most laborious ingenuity to distinguish the case of *Birtwhistle v. Vardill* from all which had preceded it, and to secure the judgment of the House of Lords in favour of his client. This is the more to be regretted, as the argument, with the exception of Lord Brougham's speeches,<sup>3</sup> now seems to be almost entirely one-sided; and in the speeches of that learned lord, the great point to which attention is directed is the fact of the inconsistency of the two laws and of the contradictory consequences that follow from it. On the point of the superior propriety of the one law or the other, Lord Brougham says nothing. His whole argument, therefore, may be conceded, and yet the justice of the judgment, nay, even the substantial policy of its doctrine, may remain untouched. For the question of policy can be settled quite as satisfactorily by compelling the Scotch law to conform to the English, as by

<sup>1</sup> Ante, vol. xxvi. p. 125.

<sup>2</sup> 1 Scott's N. R. 828.

<sup>3</sup> 2 Clark & F. 582; Ante Natus, p. 8.

compelling the English to conform to the Scotch. In either case the conformity, if produced at all, must be compulsory, and the question therefore naturally suggests itself, which of the two laws is that wherein the public benefit may be best consulted by its continuance. Taking this to be the question, there seem to be good grounds of preference for the English.

A few simple considerations appear to justify this conclusion. Marriage is evidently the corner-stone of the fabric of civil society. "It is a decent and happy permanency of union, which has, perhaps above all other causes, contributed to the quiet of society and the refinement of manners in modern times." United with the laws of property, its effect has been thus described:—"They discipline the most ungovernable, they refine the grossest, and they exalt the most sordid propensities, so that they become the perpetual foundation of all that strengthens and preserves and adorns society; they sustain the individual, and they perpetuate the race."<sup>1</sup>

These laws, in fact, are almost indissolubly united; they spring from one cause, and have one common object—the preservation of individual happiness: and if they truly attain that object, they best promote the security and happiness of society at large. The laws of marriage, like those of property, are identical in means and in purpose; exclusive possession constituting the one, universal benefit the other. The same objections, therefore, which apply to leaving the rights of property in a doubtful state, apply with equal force to abandoning to the same state the condition and the results of marriage. Assuming, therefore, that marriage in every way carries into effect, in the manner the best possible for society, that desire for personal advantage which most stimulates men to active and honourable exertion, two questions arise; first, whether to such an important contract, one which must exercise so much influence over the happiness of man and the advantage of society, publicity ought not to be indispensable? and next, whether marriage, however informally contracted, should be allowed a retro-active force, so as to produce, with relation to past events, all those consequences which would have happened had they occurred after the solemnization took place? Experience seems to

<sup>1</sup> Macintosh, Introductory Discourse.

declare, that the former of these questions should be answered in the affirmative; and the latter, in the negative.

From the earliest period the records of the Scotch Courts offer numerous instances of the evils which the doubtful mode of marriage by private contract has occasioned. There can be no forethought sufficient to prevent an ill-assorted marriage, where the law allows it to be constituted by certain words of present agreement or of future promise, the latter being followed by a *copula*. These words need not even be pronounced at the time in the presence of witnesses; they may be uttered by the parties in a moment of self-forgetful passion, and if any evidence of subsequent acknowledgment by parol or by writing can be proved, the marriage, though irregular in the eye of the Church, is perfectly valid before the law.<sup>1</sup> What, then, are among some of the consequences of such a state of the law? In the first place, the party who thinks herself a lawful wife may after the lapse of years prove to have been living in concubinage, for either the proof of the promise or of the acknowledgment may fail, or the words proved may appear not to amount to what the law deems sufficient to infer a marriage, either on the ground of the promise *cum copula*, or on that of words of present acknowledgment. Or the reverse of this may be the fact, and a marriage may be established when the parties themselves have cohabited without a suspicion, on the part of one of them at least, that expressions used by them respectively have constituted this important relation.

An instance of the first kind is found in a case of *Stewart v. Menzies*, which was decided in the House of Lords on the 6th of October last. In that case a person of the name of Menzies, occupying a very respectable situation in life, cohabited with a young woman named Christian Stewart, to whom, as of the date of the 25th of March, 1826, he wrote a letter in the following terms:—“Christy,—you and I have lived together as man and wife for some time, I hereby declare you to be my lawful wife in the event of a child being born in consequence of the present connection betwixt us.” The defence set up to the declarator of marriage brought by the woman was that the letter, though dated in 1826, was

<sup>1</sup> *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Cases, and the authorities there referred to.

really written in 1828, and was so written by the defendant for the purpose of relieving himself from an engagement into which he had entered with a young lady of his own station in life—his mode of effecting this object was that of pretending a previous engagement, and the letter was written to give a colour to the pretence. Without entering into the merits of this case as between the two parties themselves, it abundantly proves that, should it suit their purposes, two parties may deceive the world with the belief of a valid marriage having taken place between them, and may have it in their power at the last moment and after reaping the benefit of the deception, to cast themselves free from all the obligations which on behalf of society the law has imposed upon married persons. To make the validity of marriage dependent on the construction of particular words in a private contract, or on the *bona fides* of the parties, must produce the most injurious consequences.

The great case of *Dalrymple v. Dalrymple*,<sup>1</sup> and the case of *Honeyman v. Campbell*,<sup>2</sup> are instances, on the other hand, of a marriage existing where one of the parties did not believe it to exist. In the former indeed, Mr. Dalrymple (who became Earl of Stair) actually incurred the penalties of bigamy by entering into a second marriage, and whatever proof that case may afford of his indifference to the feelings of others, there can be no rational presumption that he was careless of his own safety. But this is not all. The case of *Stewart v. Menzies* also establishes a proposition tending more than ever to show the inconvenience of the present Scotch law of marriage. It is clear from that case not only that attendant circumstances may be considered as explaining and supporting doubtful expressions in a written document, so as to assist in establishing a marriage (for which purpose they were received in evidence in both the cases just cited), but that they may be admitted in proof and considered by the Court to rebut not merely a presumption of intention but a positive written declaration of fact. For in the latter case the words might receive two different constructions according to the particular position of a comma, or its total omission from one portion of the sentence; and even if not discussed in that way, an argument might perhaps be raised that the document was evidence of a previous promise and of a copula following, and was, there-

<sup>1</sup> 2 Hag. Cons. Rep. 61.

<sup>2</sup> 2 Dow & Clark, 265.

fore, sufficient in that mode of viewing it to establish a valid marriage. Indeed the main stress of the argument both in the Courts in Scotland and at the bar of the House of Lords proceeded on the circumstance of the intention of the parties, and not on that of the form of the expressions employed. So that the greatest possible degree of doubt has thus been introduced into a matter which more than any other affects the happiness of individuals, as well as the welfare of society.

Look then at the possible consequences of such a state of things. We will suppose a female willingly to cohabit with a man; suppose him to write such a letter as that produced in the case of *Menzies v. Stewart*; suppose it really to be given for a purpose entirely different from that of constituting a marriage, namely, that of deceiving the world, and thus enabling one of the parties to escape from an unpleasant position; still if the woman should be discreet, if, instead of affording by her conduct evidence that she never deemed the letter a marriage contract, she rather led the minds of all around her to the belief that she looked upon herself as a married woman, she might at any time produce the letter, and its positive terms would then enable her to establish a marriage, into which up to the last moment she had never expected nor intended to enter. The answer to this supposition may be that in such a case the law of Scotland, by subjecting the parties to a process equivalent to the English bill of discovery, might extract the truth from either of them. Lord Stowell refers to such a course in *Dalrymple v. Dalrymple*. But this is merely saying that the law would give a party the best possible opportunity for getting at the truth, by affording every possible means of discovering the evidence, even out of the mouth of the opponent party; but not that it could ensure the discovery it sought.

The result then clearly is that in this the most important relation of life the law leaves the proof or disproof of the contract in at least as great a state of doubt as it leaves that of the liability to pay for a coat or a dinner. Indeed the marriage question seems to be under the disadvantage of a much greater doubt, for he who had worn the coat or eaten the dinner would, *ipso facto*, be under such a presumption of liability that few men, except under very rare and peculiar circumstances, would hesitate in awarding payment to the tailor or the innkeeper. Is it wise that, in the present age with all our complicated relations

of family and property, marriage, such as Sir J. Macintosh has so beautifully described it, should be left in so uncertain a state?

But great as are the inconveniences which attend the mode of contracting marriage permitted by the Scotch law, the English law, assuming everything in favour of marriage, gives the heirship of English lands to a son born after marriage, no matter how irregularly according to English notions such a marriage may have been contracted. Its concession in this respect has been made the ground for demanding still greater concession. In both *Warrender v. Warrender*, and *Birtwhistle v. Vardill*, Lord Brougham pressed upon the House this matter of inconsistency. He spoke of the almost folly of which the English law was guilty, when it admitted all the consequences of a Scotch marriage, such as we have described, in favour of a son born after that marriage, and most of the consequences of a Scotch marriage as to the issue born before it, and yet refuse others—granting, for instance, the succession as to the personalty and refusing it as to the realty. It is true that this inconsistency should have been avoided if possible, but the fact that the English law has yielded much (some may think too much) is certainly not a very conclusive, hardly a gracious argument, for requiring it to yield everything.

It is manifest that in conceding to a Scotch marriage, such as may be validly contracted according to the laws of that country, all the rights as to the issue born therefrom, it yields much—it consents to throw over the creation of the most important relation of life a degree of uncertainty which, for purely civil and administrative reasons, ought not to exist with it; and it does this upon that principle of international law which, under the name of the comity of nations, makes each nation allow as much force as possible, without danger to its own institutions, unto the laws of another, but which does not require each to recognize the institutions or the laws of a foreign country to the absolute destruction of its own. This latter would be the case with England, did England admit without restriction the retro-active effect of a Scotch marriage however contracted. Personal property is in effect different from landed estate. The first ought to be instantly transferable; it ought to be subject to all the incidents which may render it available for the general commerce of the world. It may be



created in one country while the man who creates it is resident in another, and even upon contracts into which he enters under a different system of laws, and it may have a transitory existence in each of three or four countries to be finally employed or consumed in a fifth. It is, therefore, for the general good that every possible facility should be given for avoiding all conflicts of laws with relation to the administration of such property.

But landed estate, not being required for the general use in the same way, ought not to be dealt with after the same fashion. In the case of personal property itself, the rule of law, as laid down by the House of Lords in *Don v. Lippman*,<sup>1</sup> (recognized and fully adopted by Mr. Justice Story in the last edition of his great work on the Conflict of Laws,) a contract made between A. and B. in one country to be enforced in another, is to be so enforced not according to the laws of the former, but of the latter country. So that even with respect to contracts, things of a purely commercial nature (there the contracts were bills of exchange), the unrestricted application of the rule of comity is not adopted. There is still less reason why it should be so with respect to landed estate. The institutions of a country are often made dependent in a greater or less degree on the mode of inheriting land, or rather the mode of inheriting land is the great civil institution of a country from which the others arise as of course. Nobody seems to have asserted that if a man possessed of real estate in England should marry and die in a country where the lands were equally divisible among all the children, the same rule ought to be applied to his lands here; or that if possessed of lands in such a country, but happening to die here, all his lands in that country should pass to his eldest son. The one proposition could not be maintained without the other; but we are not aware that either of them has been gravely put forward for adoption. Then why should the law of this country, as to the descent of land, give way in one instance when in another it is not asked to give way at all? In principle there is no difference between its inflexibility on the question of who is legitimate heir, and its inflexibility as to the quantity of interest which that heir

<sup>1</sup> 5 Clark & F. 1.



shall take. The change of the latter is not asked, why should that of the former be demanded?

Certainly, of all countries, Scotland is the last whose law can reasonably make such a demand. With its numerous relics of feudal law, still maintained in nearly all their pristine rigidity—with its restrictions on the rights of females as to lands—with its rather curious law of arrestment and horning, and all its strange and antique anomalies of form, it certainly does not tender, on the commercial principle of reciprocity, a compensation for very serious concession. Again, it should be remembered, that though England did once admit the variety in the mode of celebrating marriages still continued by the law of Scotland, it never did recognize the retro-active effect of any marriage whatever. Lord Chief Justice Abbot<sup>1</sup> referred to the fact, that the bishops were desirous of introducing this rule as to the retro-active effect of marriage from the canon law, but that it “was refused in language which has always been remembered and often repeated.” Lord Chief Justice Tindal, in the very able opinion given by him on behalf of all the judges, relied upon that fact, observing also with great force, that at the time at which that attempt was made, and that memorable refusal given, many of the peers were foreigners by birth, or held lands abroad in countries where such a rule of descent prevailed; they must, therefore, have been acquainted with both systems of law, and they notwithstanding declared not only that such had not been the ancient law of this country, but refused to introduce it here.<sup>2</sup>

On the whole, therefore, we feel satisfied with the decision of the House of Lords. There are, no doubt, many inconveniences attending it; they are amply and ably dilated upon by Lord Brougham (whose speeches are excellently given in Mr. Moylan’s Report), but we think that a full and impartial consideration of the matter will suggest the belief, that the inconveniences would have been greater had the decision been the other way. As it is, policy here happily accords with the law; and if this important case does not assist in procuring a revision of the marriage law of Scotland, it will at least escape the objection of offering a premium for its continuance in its present state.

C. C.

<sup>1</sup> 5 Barn. & Cres. 44.

<sup>2</sup> The Ante-Natus Case, p. 63.

## ART. III.—PRESENT STATE OF PRISONS.

*A Plea for the Imprisoned, grounded upon Extracts from the Prison Reports of 1838, 1839, and 1840, laid before Parliament, and forming the Reports Nos. IV., V., and VI., together with an Account of Juvenile Delinquency at Liverpool.* London: 1841.

IN a little volume, full of truth and goodness, recently published, there is a warm exhortation to the exercise of benevolence :

“ With the most engaging objects of benevolence around them, men consume the largest part of their existence in the acquisition of money, or of knowledge ; or in sighing for the opportunities of advancement ; or in doting over some unavailing sorrow. Or, as it often happens, they are outwardly engaged in slaving over the forms and follies of the world, while their minds are given up to dreams of vanity, or to long drawn reveries, a mere indulgence of their fancy. And yet hard by them are groans, and horrors, and sufferings of all kinds, which seem to penetrate no deeper than their senses.

“ Many a man will say :—‘ This is all very true : there certainly is a great deal of good to be done—indeed, one is perplexed what to choose as one’s point of action ; and still more how to begin upon it.’ To which I would answer :—Is there no one service for the great family of man which has yet interested you ? Is no work of benevolence brought near to you by the peculiar circumstances of your life ? If there is, follow it at once. If not, still you must not wait for something apposite to occur, take up any subject relating to the welfare of mankind, the first that comes to hand—read about it, think about it, trace it in the world, and see if it will not come to your heart. How listlessly the eye glances over the map of a country upon which we have never set foot. On the other hand, with what satisfaction we contemplate the mere outline only of a land we have once travelled over ! Think earnestly upon any subject, investigate it sincerely, and you are sure to love it ; you will not complain again of not knowing whither to direct your attention. There have been enthusiasts

about heraldry—many have devoted themselves to chess ; is the welfare of living, thinking, suffering, eternal creatures less interesting than ‘argent’ and ‘azure,’ or than the knight’s move, and the progress of a pawn ?”<sup>1</sup>

The author of “A Plea for the Imprisoned” has acted by anticipation on this advice. If we are rightly informed, he is a man of fortune, moving in the best circles and highly esteemed in them, who has hitherto been content to take life as he found it (i. e. *couleur de rose*), but happening to fall in with one of the Inspector’s Reports, and alighting on some affecting details, was led to prosecute his inquiries until his feelings became interested, and the volume before us was produced.

No subject could be better adapted to answer the exigency supposed by the essayist ; no species of compilation better adapted to do good ; for, able and full of valuable matter as are the Reports themselves, they were sharing the common fate of blue folios, when public attention was suddenly attracted to them, and the labour of deliberate perusal saved to the editors of newspapers and other occupied or indolent persons, by these extracts. Thousands, therefore, are now considering whether the prison regulations have been properly carried out, and the utmost vigilance must be exerted by the authorities, including visiting magistrates as well as keepers and turnkeys, to avoid daily exposure for alleged inhumanity or neglect. This is just as it should be, and our only regret is, that a gentleman so well qualified to investigate the entire question, has only taken up a fraction of it ; for the almost exclusive object of this publication is to show that prisoners are underfed or treated with undue severity, and that prison discipline is one of the instruments of oppression employed by the rich to grind down and break the spirits of the poor. We will shortly explain how this impression is inevitably, though no doubt unwittingly, produced.

As regards discipline, a prison is frequently compared to a man of war ; but the slightest consideration will suggest that the keeper has an incomparably harder task than the captain, and that much greater allowance should be made for him. He is surrounded by all that is depraved and vicious : truth and falsehood are almost convertible terms within his juris-

<sup>1</sup> *Essays written in the Interval of Business.* London : 1841.

diction; and instead of a set of gentlemanly officers, he has only his turnkeys, necessarily persons of inferior rank and limited cultivation, to depend upon. Neither is it always possible, with the prevalent prejudice against the calling, to get persons of liberal minds and endowed with the many other desirable qualifications, for governors. Under these circumstances it becomes a very nice and delicate question, what extent of discretionary authority shall be vested in them. Unless they are enabled to act on the spur of the occasion, it is obvious that ruinous insubordination would not unfrequently ensue; whilst, if their powers are not carefully defined, these may often be abused to tyranny. The Prison Regulation Act enables the governor to inflict slight punishment, as the reduction of the prison allowance, or solitary confinement for short periods; but we need hardly say that the frequency of such inflictions varies with the character of the individual.

The subject of diet involves considerations of the highest moment. "Here," says Mr. Chadwick, in his excellent Report on the State of the Poor in London and Berkshire, "within one small locality, we find the honest labourer the lowest in point of condition; the indolent pauper the next step above him; the refractory pauper, or the petty delinquent, the next step above the pauper, and nearly approaching to the condition, in point of food, of the soldier; and the convicted felon rising far above the soldier, the petty delinquent, the pauper, or the industrious labourer. But it appears to be true, as declared by the refractory paupers, who proclaim their independence of all regulation, that, if they get themselves transported for some more greivous delinquency, that they will receive even better treatment." According to his scale, the independent agricultural labourer averaged of solid food per week, 122 oz.; the able-bodied pauper, 151; the soldier, 168; the suspected thief, 181; the convicted thief, 239; the transported thief, 330.

Every thinking man will instantly admit that society cannot exist upon such principles. If the dependent poor are permanently better off than the labouring poor, there is an end to prudence and industry; if the criminal is better clothed, lodged and fed in prison than out of it, there is a

premium on crime. The diet of a criminal should be just sufficient to maintain him in health, but it must never be forgotten that he is imprisoned for the express purpose of undergoing privation; and (considering the sudden revulsion) it does not at all follow that any mental depression or bodily suffering that may ensue, is to be imputed to the food. It is, moreover, an important fact, that some diseases are more common amongst the rich, and some amongst the poor. Diarrhœa and typhus are amongst the latter, and persons who have injured their constitutions by irregularities are peculiarly subject to be attacked. How then are the ordinary inmates of a prison to be protected from such complaints, unless indeed they are to be put upon a warm, generous, and cordial regimen during the whole period of incarceration; in which case, we incline to think, the sudden recurrence to a meagre one on their discharge, would produce much more than a compensating amount of suffering. Indeed, before concluding, we shall show that prisoners, even before leaving their prisons, have invariably suffered most from over-feeding.

Hard labour is another topic as to which a great deal of misapprehension prevails. There is hardly any sort of labour which has not its attendant malady or risk; and we have no doubt that there are constitutions to which the peculiar kind of exertion exacted at the tread-mill is uncongenial. But, generally speaking, it is not an unwholesome employment, and the tasks are proportioned to the strength. Neither is imprisonment with hard labour so very unequal an infliction. It is true that a man of sedentary habits, a tailor for example, suffers more upon the mill than a labourer who is constantly upon his legs; but he suffers incalculably less from the confinement.

Taking, then, these various sources of doubt and difficulty into consideration, we should expect, without any direct evidence, that both keepers and visiting magistrates would occasionally do wrong, but we should not expect them to do wrong upon one set system; and we find, in point of fact, that they have occasionally erred from strictness, very often from laxity: that in some prisons the quantity of food is thought too little, in others too much; and that, on the whole, "A Plea for the Public" might have been established as easily

as “A Plea for the Imprisoned,” were any one disposed to prosecute another one-sided inquiry into the Reports.

For example, Captain Williams, the intelligent and humane inspector particularly commended by the author, speaks thus of the Castle (the county gaol) of Lancaster :

“No person, however uninformed upon the subject of penal establishments, upon going through this prison, can fail of being satisfied but that it is wholly inefficacious for its purposes ; that, as to discipline, it is in vain to expect it where unrestricted communication is openly permitted, where prisoners are sleeping three and four together in a cell at night, and where the diet is infinitely superior in a great number of cases to what the prisoner enjoys when untainted with crime.”

After giving a most unfavourable account of the lax discipline pursued in the Preston County House of Correction, he quotes the surgeon to this effect :

“There have been no cases of epidemic disease since inspector’s last visit. We have had three cases of fever, but it did not assume the typhoid form. It is a remarkable fact, that we have not had a case of typhus for seven years in this prison. *The diet is ample ; and I consider it is too much for the females.* The extra diet has been discontinued to those on the wheel.

“*Labour.*—There is scarcely anything in this prison deserving of the name ; the tread-wheel labour is mitigated by the laxity of discipline which is allowed to prevail among the prisoners while engaged upon it, and referred to in another portion of this report.

“In addition to the tread-wheel, the male prisoners are also employed in weaving and picking cotton ; the women at washing, sewing, and picking cotton. The want of an additional officer to superintend the prisoners while at work was quite as evident in the picking-room and weaving-shops, as at the tread-wheel.

“I conclude with a summary of the principal defects of this prison :—laxity of the general discipline, lightness of the labour and restrictions to which the prisoners are submitted, neglect of providing some employment for prisoners before trial and those not sentenced to hard labour, and also of any means, such as the imposition of silence, for preventing mutual contamination. The classification of prisoners in custody for debt, with those for criminal offences. The disregard of the provisions of the Acts of Parliament for the better ordering of prisons, by the employment

of prisoners in the service of the officers, and the absurd practice of giving an extra allowance of food to those instructed in psalmody."

In these two gaols therefore the diet is superabundant, but the main objects of penal restraint are completely frustrated.

The author of "The Plea" will probably say that he had nothing to do with this class of errors, and that he merely wished to call attention to those which wore the shape of oppression. But surely this is a dangerous principle to act upon in the present state of things, when Chartist doctrines are spreading rapidly, and the labouring poor are only too prone to treat the higher classes as oppressors. Accordingly we have thought it right to intimate that any general conclusion to this effect founded upon the Reports would be fallacious; and having now given full warning, we proceed to consider how far the extracts, considered unconnectedly, bear out the charges that are based upon them.

In a clever preface the author gives his own estimate of his proofs, but either the warmth of his feelings, or the liveliness of his imagination, has induced him to throw aside many of the mitigating circumstances that present themselves on turning to his authorities. For example,

"Next follows (at page 103) the case of an unhappy patient, which thrills me with indignation and pity while I transcribe it, but which will not affect in the same manner the pious martinets of prison discipline, who may see in the sufferings of their victim only the fair consequences of their system.

"A consumptive prisoner is committed; he is clad on his coming to the prison-gate in a flannel waistcoat; this is taken from him, and he is invested with a prison dress, which gives no flannel; *he begs most earnestly to have it back again, but this the prison regulations forbid*; and the gaoler is too conscientious a man to infringe them; indeed, it would be as much as his place is worth, and, in all probability, had he acted from his own sense and from his own discretion, he had been dismissed. The miserable man dies *soon after*; not, of course, through being deprived of such a superfluity, but of consumption; how sadly aggravated his sufferings were and how much accelerated his death, is neither known nor cared for. What is known and too much cared for is, the uniformity of the



prison discipline. In damp, cold cells, unaired, unwarmed, flannel waistcoats are not allowed; and if feloniously brought in on the body of the offender, they must be taken off; 'they are contrary to the regulations.'—pp. 18, 19.

The authority is the surgeon of the gaol, who says,

“ ‘ Many men on coming in lose their flannel, which is taken away from them on their coming in, after, perhaps, having been accustomed to it all their lives; and from the exposure to the cold, and sudden checks to perspiration, to which the prisoners are exposed, I am satisfied that injury has been done in some cases; F., since dead of consumption, complained most heavily of the loss of it, and it was not till his sufferings from cold, and satisfied of the necessity of it, *that I ordered him one.* Many of the labouring class wear flannel belts.’—p. 60.

Here we find “since dead” converted into “dies soon after,” and the flannel waistcoat ordered by the surgeon is lost sight of altogether.

Captain Williams is repeatedly commended for humanity, yet in his Report on the York Prison he expresses his satisfaction that gaol clothing has been supplied to the male prisoners, and suggests that it should be extended to the females. One of the principal duties of the surgeon is to point out where the regulations cannot be enforced with safety, and from the opinion this surgeon appears to have entertained regarding flannel waistcoats, it is not probable that the restoration was delayed. Exaggerations of this kind involuntarily remind us of “the revered and ruptured Ogden,” who was actually proved, on due inquiry, to have been cured of a disease of twenty years standing in the gaol.

Passing over for the present the abridged statements of the preface, we will now take the extracts as they occur.

*Dorchester County Gaol and House of Correction.*—“ The surgeon recently observed, that the prisoners sentenced to hard labour were suffering considerably from diarrhoea and weakness, and made a strong representation to the magistrates on the necessity of augmenting the diet. This was accordingly acquiesced in, and the following is a copy of two orders made by the visiting magistrates :—

“ ‘ *March 10th, 1838.*—It having been recommended by the surgeon, in consequence of the prevalence of diarrhoea amongst the hard-labour prisoners, to substitute more solid food for the gruel, we direct that three ounces of Dorset skim milk cheese, and



an extra half pound of bread, should be given, instead of the potatoes, for dinner, on Mondays, Wednesdays, and Fridays, to all male prisoners sentenced to hard labour, except vagrants, until further orders.'

" ' *March 16th, 1838.*—From the representation of the surgeon, it becomes highly necessary to make an immediate change in the dietary of the prison, and to allot an additional apartment for the reception of the sick, the increase of whom is now so great, that the hospital is not large enough to contain them, and, therefore, we direct that the room formerly occupied by ——— be appropriated to that use, and that three ounces of cheese, and an extra quarter of a pound of bread, be given to all male and female prisoners in the gaol every other day, until the next sessions, when the subject can be discussed.' "—pp. 20, 21.

On the 10th of March, the hard labour prisoners were affected: by the 16th, the epidemic had extended to the rest. It was not, therefore, the hard labour that caused the weakness and diarrhoea, and it does not at all follow that the ordinary diet was insufficient, because an addition was found necessary for a month or two.

*Bristol City Gaol.*—" During the prevalence of fever, last autumn (1838), the surgeon slept here on the alternate nights during two weeks. The disorder commenced with symptoms resembling cholera, but they passed into fever rapidly; no one died. He called in a physician, and came himself two or three times a day; he had every convenience. In July and August, 1837, there was a similar attack of fever, but not so severe, and not beginning with symptoms akin to cholera.

" The diet was altered in December, 1835, and since then the cases of diarrhoea have diminished, at least, in the proportion of seven out of ten."

It is to be regretted that the author has not specified what he complains of in this instance.

*Gloucester County Gaol and Penitentiary.*—" Solitary confinement lasts only a fortnight, in general, sometimes a month. The prisoners are let out each day for half an hour each time. At the end of the first fortnight the diet is increased. All the other prisoners use their yards, except at meal times, and during labour.

" Those who are in solitary confinement for a fortnight generally become emaciated, and very frequently suffer diarrhoea, but then they have only a pound and a half of bread, and a pint and a half

of mint water during the day, which is too little. The surgeon continually puts them on extra diet. The keeper also agrees that they are not the same men afterwards that they were before.

“ The surgeon thinks that after two months meat is requisite for the hard-labour prisoners. He is of opinion that a great improvement in the health has taken place since the diet was changed, about ten years ago ; it was then too liquid. Before this he recollects an epidemic typhus, which was then, indeed, the general disease. Diarrhoea was the first stage, which ended in low fever. He remembers forty cases of typhus fever to have occurred at one time.

“ The surgeon has held his office nearly thirty-five years.”

Ten years ago the diet was found too liquid, and was changed. So far, so good. But prisoners in solitary confinement for a fortnight, on a pound and a half of bread a day, with a surgeon continually putting them on extra diet, are not the same men afterwards that they were before. We dare say they look thinner, but it is contrary to all medical experience to assert that their constitutions could be permanently affected by such a regimen for so short a period. Besides, the surgeon is there to mark the exceptional cases, and is evidently not wanting in humanity.

*Devizes House of Correction.*—“ In my former report I noticed a tendency to diarrhoea, which tendency has continued, more or less, ever since. In previous years it seems to have prevailed most in the months of November and December, and also at all seasons after sudden changes of the temperature. During April and May, (1838), almost every prisoner seems to have been more or less subject to it. It has never prevailed so extensively as during the month of May just cited. On examining the prisoners in the following November, I found several afflicted with looseness, some receiving medicine, and a few not ; some others had suffered from it two or three times during their stay in the prison. The remedies formerly administered were cretaceous mixtures, with Dover's powders, and rice pudding. Latterly the surgeon has derived most success from one grain doses of acetate of lead, combined with one-third of a grain of opium every six or eight hours. This latter medicine always allays the complaint, and when combined with warmth and rice pudding, usually cures it. When, at the end of two or three days, the appetite returns, porter, meat, and meat broth are sometimes given. Throughout the whole year, some cases, more or less severe, of diarrhoea, are under the surgeon's care.

“ After considering the subject attentively, I am led to the conclusion *that the diet is probably the chief source* of the evil. The diet, at all events is the matter most easily to be corrected, and when improved, will probably extirpate the particular tendency to this disease. In my suggestions will be found the improvement which I proposed to be made in the diet. Since my visit, one portion of my suggestions has been carried into operation ; namely, the allowance of one pint of warm gruel to every prisoner at supper ; and from a communication which I have since received, (January, 1839,) I learn that the prison was then more healthy than usual, and that the diarrhoea did not prevail since the introduction of this gruel ; only two patients were in the infirmary at the end of December. The surgeon states that ‘ the prisoners are decidedly more free from diarrhoea.’ It is made from one ounce of oatmeal to one pint of water, well boiled (which is no unimportant point), and it is flavoured with ginger and pepper alternately. The prisoners may use as much salt with it as they please. It is ‘ grateful and comforting to them,’ and cost only three farthings per head daily.”

After considering the subject attentively, the inspector only says, that the diet is “ probably ” the chief source of the evil.

A case which occurred in this gaol is made the groundwork of a violent diatribe. It seems that a man, of the name of Everett, caught a chill from changing his shirt and drinking cold water whilst in a state of perspiration after working at the mill ; he desired the turnkey to send the doctor, but the surgeon did not come till the day following, when the governor came with him ; the surgeon said he had a cold and would be better in a day or two : no additional clothing or food was ordered for him, and he never saw the surgeon during the remainder of his imprisonment, about a fortnight. On leaving the prison, he was in a state of great debility ; he was taken into the Salisbury Infirmary, where abscesses broke out under his arms. It is added, “ that he has continued ill ever since, and is now an out-patient of the Salisbury Infirmary ; his wife and family being chargeable to the parish ; *that, sixteen years before he was committed to prison, he had a chill, and was attacked in a similar manner, and continued unable to work for three months.*”

This case, with some others which broke down, underwent a careful investigation by a committee, who reported the evi-

dence to the Court of Quarter Sessions. It does not appear what course was taken, but the author observes :

“ This Devizes case is worth attending to, for it bears the same features which are found in almost all investigations, where the poor man prefers a complaint against the workhouse or the prison house. This picture I maintain to be fraught with danger, as it is replete with hardship ; it is the nonsuiting the aggrieved and disabled petitioners and abetting the officer, whoever it be, who commits the wrong. How different is this state of things to what it formerly was, when the poor man, always looked to, almost always found in the rich man his friend, patron, and avenger.

“ The bias now is ever to support the officer, and to throw impediments in the way of the injured person, who after losing, as in this instance, *employment for three months*, in addition to his sufferings, obtains no redress. In a man-of-war the rule is always to support the officers, however much in the wrong they may have been ; the necessity of this among 700 armed men at sea, superseding the justice of it. But on land this practice ought not to prevail ; for wherever it does, it must tend to widen the breach, already broad and deep enough, between ‘ those who have and those who have not.’ If just and fair dealing does not prevail where the poor man and the prisoner pleads ; if, indeed, something like favour be not shown him, how can he possibly, who is without character, without friends, without education, substantiate the harshest usage against gaolers and turnkeys, who are, in their dark kingdom, almost monarchs ?”

Titus Oates treated every attempt to test the truth of his narratives, as a participation in the plot ; and it now appears that every inquiry into the truth of charges brought by prisoners is to be regarded as part of a wide spread conspiracy against the poor. In our opinion there never was a period in which the poor man found friends, patrons, and avengers more easily than at present, when a case of starvation or oppression is positively a God-send to many of our unoccupied legislators, and some of the most influential newspapers ; but justice is justice, though a gaol surgeon be the alleged offender, and even a turnkey should not be condemned unheard, or condemned at all unless the evidence against him is satisfactory. It is far from clear, that Everett’s prolonged illness was attributable to the neglect of the gaol officers ; and where is the authority for his losing three months’ employment ?

Simply his own statement regarding what befel him sixteen years before, when he "was attacked in a similar manner, and continued unable to work for three months." As the periods of suffering correspond, it seems not impossible that there was some analogy in the causes.

From the extracts regarding the Coventry city gaol and the Worcester county gaol, it appears that the inspector was of opinion that the diet was too low. It does not appear whether his suggestion has been attended to. It is remarkable, however, that when the prisoners in the Worcester county gaol were attacked by fever, depletory rather than stimulant remedies were predominant in the treatment.

Prisoners for examination in the Reading Gaol are not permitted to communicate with any one, nor to attend divine service. The magistrates, by whom such regulations have been enforced, are highly culpable. Yet we do not see why the inspector is to be condemned because he does not fall into a passion in condemning them. The author exclaims :

"Is it credible, that in a country where a constitution does exist, that such an avowed and insolent violation of the law should be sanctioned by these unblushing magistrates? Who can read unmoved 'this rule of the prison,' which sets aside, without scruple or remorse, the unquestionable rights of every imprisoned man. This 'rule of the prison' ought, together with its framers, to be held up to general execration; for it has as fearlessly set aside divine law as it has human statute, in proof of which read that 'prisoners under examination are not allowed to attend divine service!' Can impiety and cruelty go much beyond that? Yet these gross violations of the law are related with calmness by the reporter, and meets with no reprobation from higher authority."

The extract regarding the Springfield County Gaol (Essex), establishes the unhealthy narrowness and defective ventilation of the cells used for solitary confinement. As to the diet of this prison :

"The surgeon expressed to us his opinion that the prison allowance of food is not sufficient for those prisoners whose sentences exceed three months: and he states that, in order to maintain their health, he finds himself constantly called upon to order extra diet, consisting of ten ounces of meat, and a pint of soup daily. There were seventeen prisoners receiving extra diet on the day of our last

last inspection ; and this, in addition to twenty other prisoners who received extra diet as being employed in the service of the prison, viz. : two bakers, two cooks, the washhouse man, the infirmary man, and fourteen cleaners, each of whom daily receives four ounces of meat and a quart of soup, in addition to the ordinary prison allowance. The surgeon stated that without such extra diet he could not maintain the health of the prisoners ; he added, that there is a constant tendency to scurvy, and this is to be attributed to the scantiness of the diet, and to the bad ventilation of the cells."

The diet is low, indeed, if this surgeon's notions of extra allowance be correct. The convicts under his care must be better fed than any labourers in the country.

The extract regarding the Westminster Bridewell runs thus :

"It not unfrequently happens at this prison, that prisoners are obliged to be relieved from taking the customary food, and rice milk has been substituted, for no other cause than that the stomach rejects the ordinary diet. It is the opinion of the surgeon that the diarrhoea of prisoners is partly consequent upon the want of change in the food. He has accordingly recommended a change of beef with mutton, alternate months. He is also of opinion that it would be advantageous to the prisoners to have the meat served to them cold. By the meat being cut up hot, the whole of the gravy or juice of the meat escapes, *and it becomes therefore less digestible.* By cooking the meat a day previously, and carving it cold, a greater quantity of animal matter would be given ; a greater quantity of nourishment would consequently be given in the same proportion of weight."

At some of our large public schools it was formerly the practice to feed the boys on mutton exclusively, but we never heard that diarrhoea was produced. At the same time, a change of food may be beneficial. The same surgeon adds :

"I have found that men, after they have been in prison from three to four months, and kept constantly at wheel labour, have often become weak and thin, and in those instances where they have undergone punishment, and had repeated stoppages of food, they have been very much attenuated."

"Upon reference to the list of prisoners who have been committed for six months and more, during the last twelve months, I find, out of twenty-eight persons, fifteen have had either extra diet frequently, or been the inmates of the infirmary.

“ The boys also, who have been repeatedly in prison, with trifling intervals, have enlarged scrofulous glands.

“ It is worthy of remark, that the persons sentenced for long periods are usually reputed London thieves, and persons who have been in good circumstances ; both classes living well without the prison.”

“ Living high and irregularly” would be a more correct description of the habits of such persons than “ living well.” Of all classes of offenders, they are the least entitled to sympathy. It is alleged, that the cells in this prison used for solitary confinement are too small—being only eight feet long, six feet wide, and nine and a half high. The ventilation, however, seems the principal defect.

The extract relating to the Giltspur Street Compter discloses an extent of negligence in the classification of prisoners, reflecting the deepest discredit on the Court of Aldermen.

The Bedford County House of Correction is described as peculiarly subject to the land-scurvy, the prevalence of which is ascribed by the surgeon to the strict discipline, the scantiness of the diet, and the defective ventilation of the cells. When statements of this kind are made, it is satisfactory to come to particulars :

“ With reference to the first point, the strictness of the discipline, we have to observe, that the prisoners are employed on the tread-wheel, which is much exposed both to the heat in summer, and to the cold in winter. There are no rest-benches provided for the prisoners when off the wheel ; but they are compelled to walk round in a circle in the yard, adjoining the tread-wheel, during the interval allowed for rest. During the hours of labour (which for four months of the year are ten ; for four more, eight ; and for the remaining four, six) ; the prisoners are at work without any interval, except during meals. This uninterrupted exertion must greatly reduce the strength, which is rendered still weaker by the great exposure to heat and cold.”

The periods of labour are not excessive ; labourers in general are at work without any interval except at meals ; and the prisoners are compelled to keep moving to prevent their catching cold ; but the exposed situation of the tread-wheel is a serious objection.

“ With respect to the second point, the scantiness of diet, we find



that the ordinary diet consists of two pounds of bread and rather more than one ounce of cheese per diem. After three months' confinement, the prisoners are all allowed twelve ounces of suet dumplings three times a week; and after six months, three pints of beer a week. It is during the period when the diet consists of only bread and cheese that the health becomes impaired, and the subsequent addition to the diet fails to restore it."

Is the author of "The Plea" aware that a half quartern loaf only weighs two pounds? How often have we seen an honest ploughman, after toiling for five or six successive hours through a stiff soil, sit down under a hedge, produce a hunch of bread and a small bit of cheese, make his dinner on it, and then resume his labour for five or six hours more. Do we say that such things ought to be? Far from it. There is no humane man who would not echo the famous wish of Henry the Fourth, but this is not to be realized by making convicts the first objects of consideration.

A witness examined by Mr. Chadwick stated, that an agricultural labourer in Norfolk was sitting by the way-side eating the contents of his wallet for his dinner,—a crust of bread and some exceedingly hard cheese; when a vagrant, who was passing, asked him if he had no meat to eat with it. The labourer said, none; except on the Sunday he never tasted it. Poor fellow, said the beggar, you shall not be without meat to-day at any rate. He took a piece of refuse meat from his wallet and bestowed it upon the hard-working labourer. That labourer told the witness that the beggar had just obtained the meat from the benevolent squire, his master; and observed, that if he were to beg for more than the bread he got in return for his labour, he would probably be spurned for his pains.

The Borough Compter, Middlesex, is in a very bad state. The visiting aldermen state that nothing but re-building it will enable them to establish any proper system of government and classification.

In Wakefield, numerous cases of diarrhoea had occurred since the breaking up of the frost, and an alteration of the diet was deemed necessary.

At Louth, and Great Yarmouth, the cells used for solitary confinement are condemned in the strongest terms by the in-



spector. He says,—“The prisons of Norfolk and Suffolk do little honour to the magistrates and gentry of these counties,” but the foundation of the charge appears to be remissness, not severity, except at Woodbridge, where the discipline is said to be too strict.

The Derby county gaol enjoys a high reputation for order, but the inspector “suspects” the discipline to be of a very severe kind. The cells are said to be too small, and the prison too cold. At Richmond, the cells are also too small, and at Northallerton the prisoners suffer from cold. “In York,” says the author, “the allowance of food is good—2 lbs of bread and a pint of milk, and a stew twice a week. In some places 1 lb of bread and a pint of mint water is thought ample.” We defy him to name one, for we presume he is not comparing an exceptional diet imposed by way of penalty in one prison, with the general dietary of another.

The remaining extracts, with the exception of a statement regarding the Millbank Penitentiary, are taken from the Sixth Report, on the northern and eastern district, by Captain Williams. This gentleman was instrumental in procuring the release of eleven prisoners, imprisoned for non-payment of fines imposed for not going to church. “If it was necessary to revive this odious statute of Elizabeth and James (says the author), why was not the experiment made on the gentry of the neighbourhood, who are not perhaps all constant churchgoers? The fining of a country gentleman or a neighbouring baronet had made a conspicuous example, and would no doubt have brought everybody to church in good time for the next twelvemonth; but to afflict helpless men, poverty-stricken, was inhuman and inefficacious.” For once we cordially agree with him. The statute in question should be immediately repealed.

Attention is very properly called to the present manner of inflicting corporal punishment, which is left too much to the discretion of the keepers, as well as to the practice of imposing indefinite periods of imprisonment for nonpayment of fines or costs, which is utterly indefensible.

A case at Chester excites a great deal of the author’s indignation :

“I beg attention to the subjoined case at Chester, which is so

succinctly and calmly related by the inspector (according to his duty),<sup>1</sup> that it might be passed over, if not particularly pointed out.

‘A complaint (says the inspector) was made to me by a criminal prisoner, of being illegally detained in custody, he stating that he had, in the first instance, been committed for trial at the sessions, and after a lapse of some days, was called up by the keeper, and told that he had been summarily convicted, and adjudged to twelve months’ imprisonment. After due inquiry, his case was referred by me to the Secretary of State, who directed his discharge.’

“Can any thing (continues the author) be more contrary to law, or more oppressive than this? for by it a man is deprived of his just rights, of jury, judge, counsel, and witnesses. He is in prison, but he is not brought into Court. The gaoler takes upon himself the offices of judge and jury, and does that which the king himself cannot do; for the king can only pardon, he cannot condemn.

“This deliberate and flagrant act calls, I think, for condemnation from the Secretary of State, and not only for the liberation of the prisoner; indeed, the dismissal of the gaoler would not be too great a punishment for so serious an offence. It has been published in the newspapers, but has not attracted much notice.

“I will here insert a letter upon this subject, which was sent to the *Morning Chronicle*.”

The letter is strong enough in all conscience, but the reason why the case did not attract much notice is obvious enough. The man was summarily convicted in the first instance. If he had been merely committed for trial, there would have been no necessity for a reference to the Secretary of State, who neither could nor would have directed his discharge; and if he had been detained without a warrant, we take it for granted that the inspector would have noticed the circumstance.

At one of the county towns on the midland circuit, there used formerly to be almost always a long arrear of prisoners, and not unfrequently three criminal Courts (the two judges and a leader of the bar) were sitting during the last two days of the assizes at the same time, and a great deal of confusion was the result. A stupid fellow, accused of duck stealing, was acquitted for want of evidence, but the ceremony was so rapidly performed that he himself was unconscious of his deliverance; and when another case was called on, he simply drew back

<sup>1</sup> See ante, p. 46, where another inspector is censured for calmness.

into the space allotted for untried prisoners. Some of these were shortly afterwards draughted off into the other Court: the duckstealer was of the number, and the same ceremony was repeated: but the scene was still a maze to him, and, by a strange concurrence of circumstances, he found himself a third time before a judge. Here, however, a faint glimmering of the oddness of the proceeding broke upon him, and on being required to hold up his hand, and say guilty or not guilty, he drawled out: "Plaze your Honour, how often be I to be had up about that ere duck."

This is a bar story of the olden time, no longer capable of strict proof. We tell it to illustrate the possibility of a clown's mistaking the nature of the mystic ceremony performed upon him in a criminal Court. We will lay any odds that the statement of the Chester keeper was correct.

The governor of the Salford prison is censured for punishing breaches of prison discipline on the turnkey's report; and stopping part of a prisoner's allowance is deemed an improper mode of punishment. The governor of the Preston County House of Correction adopts the only remaining alternative; but he is equally censured—

"To show the want of discretion I make the following extracts, under the following dates:—

"June, 2, 1839. James S., William R., and Benjamin H., awarded three days' solitary confinement for having dirty feet. April 6th. Joseph D., three days' solitary confinement for picking a prisoner's pocket in prison chapel. June 24th, William B., three days' solitary confinement for not washing himself. September 28th. John S., three days' solitary, for not getting out of his bed when the bell rung. August 19th. Thomas R., William H., and Thomas R., three days' solitary for provoking prisoners to quarrel."

"The picking pockets in chapel, and a neglect of personal cleanliness, are punished alike."

The punishments were not inflicted for offences against law and morals, but for breaches of prison discipline, and three days formed the maximum. Does the police magistrate who inflicts the heaviest penalty within his power rather than send an atrocious assault to the sessions, thereby put it on a par with all offences to which the same penalty is attached?

The inspector censures the surgeon of this prison for laying

it down as a rule never to allow any extra food or alteration in the diet to any but patients in the hospital :

“ This appears to me an injudicious departure from those sound precautions for the preservation of health observed in other establishments. I allude particularly to the cases of soldiers imprisoned here under sentences of courts-martial, for lengthened periods, and who have, in several instances, suffered most materially in health. Had this regulation been enforced by taking every prisoner into hospital who might seem to require extra diet as a preventive to disease, I should not have felt it my duty to make these remarks, but I find, from the surgeon's admission, this not to have been the case.”

The uncontroverted statement of the same surgeon “ that the diet is ample, and too much for the females,” is not extracted. Yet this completely changes the whole complexion of the case ; for how, in the opinion of the very man who thought the diet ample, could any prisoner “ seem to require extra diet as a preventive to disease ?”

Captain Williams' Report on juvenile delinquency does him great credit ; but we are unable at present to give it the attention it deserves. He states that the number of juvenile prisoners committed during the year (1840), to the Liverpool Borough prison, was 709 ; 316 as known or reputed thieves, and 256 as vagrants. In a former Report he attributed this undue proportion of juvenile delinquency to various causes : “ the fluctuating variety and vicissitudes of a great maritime town ; the continual ingress of poor Irish ; the absence of factory employment, or other work, for children ; the number of destitute orphans from the deadly visitations of cholera and fever ; the temptation afforded to want and idleness by the comparatively unguarded and careless exposure of valuable property in the markets, stores, and about the dock ; the excitement to criminal pursuits induced by low shows and theatres.”

All these causes he states to be still in active operation, but conceives that he greatly underrated the mischievous effects of corrupting public amusements :

“ The passion for the theatre among the children of the humbler classes in large towns, is, of itself, the most common impulse to crime. In the greater number of cases, parents, compelled by

straitened circumstances, send from home their children, when scarcely beyond the confines of infancy, to eke out, by some employment, the subsistence of the family, leaving neither time nor opportunity for the cultivation and proper direction of their mental powers. Thrown thus early into active life, they acquire, both by intercourse with their fellow-labourers of more advanced years, and from personal observation, a precocious and pernicious knowledge of the world. Inordinate desires spring up in their youthful minds, and in the absence of a moral sense to restrain them, they scruple not to resort to dishonest means for their gratification."

It will always be difficult for the poor to procure time for the cultivation of their children's mental powers, or to avoid "throwing them into active life," or prevent their acquiring "a precocious knowledge of the world." The inspector gets less speculative as he goes on.

"The first act is generally the subtracting of pence from the shelves, drawers, and indeed the persons of their parents or relations, for the purpose of obtaining admission to some low theatre or amusement, of which they have heard the most captivating descriptions. This rubicon once passed, neither menaces nor blows are of avail. Late hours, loose associates, abandonment of home, robbery from the person and shops, utter vagabondism follow in a quickness of succession quite lamentable. Perhaps in no other town in the United Kingdom has the demoralizing influence of low theatres and amusements upon children been so decidedly experienced as at Liverpool. The number of children frequenting the Sanspareil, the Liver, and other theatres of a still lower description, is almost incredible. The streets in front, and the avenues leading to them, may be seen, on the nights of performance, occupied by crowds of boys, who have not even been able to possess themselves of the few pence required to obtain admission."

This reminds us of the imitation of Crabbe in *The Rejected Addresses* :

"Boys, who long linger at the gallery door,  
With pence twice five—they want but two pence more,  
Till some Samaritan the two pence spares,  
And sends them jumping up the gallery stairs."

A curious description of a place called the Penny Hop follows :

"I had some conversation with the persons in the interior who appeared to have the management, and they stated, in answer to my

questions, that the theatre was almost always filled, and with boys; that they had attempted to play 'Jack Sheppard,' but, in consequence of the frequent interruptions from the audience, who seemed all to wish to take a part in the performance, they were obliged to give it up. I understand the authorities have no legal power of either regulating, restraining, or putting down such dens of infamy, and that children of the most tender years, and entering by themselves, cannot lawfully be prevented. I trust, however, that the borough magistrates and town council of Liverpool, who have ever manifested a deep interest in this subject, will lose no time in obtaining from the legislature, powers so necessary for the protection of society, and which have already been vested in, and most beneficially exercised by, the commissioners of police for the metropolis."

This is a strange mistake. There can be no doubt whatever that such places may be regulated, restrained, or put down by the authorities; either as disorderly houses, or unlicensed places of entertainment. They ought to be put down immediately, but the magistrates and town council must do a great deal more to reduce the amount of delinquency. We are convinced that the effects of such productions as "Jack Sheppard" are enormously overrated; and that the playground or the ginshop may furnish idle lads, in a town like Liverpool, with as many opportunities for making improper acquaintance as the theatre. Thus, amongst the examinations or confessions quoted to establish the point, we find:

" ' No. 10. M. A.—I never was at any of the theatres, except a penny show at the top of Preston Street. I think they called it P——. I first met with bad company by stopping to see boys play at pitch and toss.'

" ' No. 13. I. M.—I was never in any theatre. I left my father's house through his bad conduct towards me. I soon met with idle boys, who enticed me away with them. The first thing I stole was a roll of tobacco off a shop counter; we sold it for 1s. 6d. at a house in B. — Street.'

" ' No. 15. I. W.—I was never in any theatre, but was often at the shows opposite the Custom House. I stole the money from my parents except once; I stole that from a woman. I got acquainted with many bad boys by going to the shows.'

" ' No. 16. M. L.—I never was at any theatres, but I have been oftentimes at the shows opposite the Custom House. I got my money by cleaning ships' decks. I was never with any bad boys.

I was never brought up to prison for any thing but old ropes, &c. I got off ships for cleaning them.' "

Pitch and toss, therefore, is a corrupting amusement, and all sorts of street amusements, including Punch with his strict poetical justice, should be suppressed. It is very strange that sensible men cannot make a few sensible observations without instantly trying to lay the foundation of a theory.

Captain Williams quotes a French writer, M. Frégier, to prove that similar evils have been produced in France by such dramas as the *Auberge des Adrets* and *Robert Macaire*. We can supply him with an equally curious illustration. About four years since a Parisian *grisette*, convicted of some petty theft, owned that her sole object in stealing was to procure money to subscribe to a circulating library, and it was a subject of playful contest amongst the popular novelists, particularly Paul de Kock and Balzac, which of them was morally answerable for her delinquency. But we must not be too hasty in our inferences; for Fielding mentions an old lady who stole Tillotson's Sermons for the sake of religion.

The concluding extracts are taken from the report of the physicians on the Millbank Penitentiary in 1823. No attempt is made to apply them to the present state of the prison, but the motive for quoting them is thus stated in the Preface.

" I am, besides, much opposed to the making any experiments on the human body while yet alive, and I shall show, in the extracts from Dr. Roge's account of the Penitentiary, how long a catalogue of diseases, and even of premature deaths, ensued in that prison from the experiment of lowering the diet. The sum of it is, that 400 prisoners were taken ill; many died most excruciating deaths; and the then Secretary of State (Sir R. Peel) humanely remitted the sentence of most, justly deeming their sufferings in the hospital of that establishment a full equivalent for their crime. Nevertheless, undeterred by this, the managers of many prisons still persist in trying the minimum of diet, and much debility is the consequence in Bodmin, Swaffham, Falkingham, and other gaols."

Subsequent experiments fully justify the managers; and it is clear from these very extracts that the change of diet was not the cause of the complaint, let the physicians say that they will. The essential facts are these: The general health of the prisoners began to be affected in the autumn of 1822,



but the epidemic did not reach its height until the February following, when more than half of the whole number (800) of the prisoners were affected by it, diarrhœa and dysentery constituting the majority of cases in the infirmary. The officers, with their families, were universally exempt, and out of the twenty-four prisoners employed in the kitchen, only three, one man and two women, fell ill. "The women were affected much more extensively than the men; and (both men and women) the second class, which is composed of those who have been longest in confinement, was affected in much larger proportion than the first class, which comprises those who have been more recently imprisoned. Of the women, about two-thirds were ill of the disease; of the men, rather less than one-half."

After expressing their conviction that the situation of the prison was not unhealthy, the reporters (Drs. Roget and Latham) proceed to speculate on the causes, and they conceive the main cause to be a change in the diet, about eight months before, by which the animal part was reduced to about an ounce and a quarter a day for each person. "It does, nevertheless, appear to us, that the diet of the prison has not itself alone been productive of the disease, but that it required the concurrence of other causes, of which the severity of the winter was probably the chief. The origin of the disease has been traced to the commencement of the cold weather, and its progress and increase have kept pace with it. There are, moreover, two circumstances which confirm us in the belief, that diet and cold have been concurrent causes. The sufferers were most numerous in that class of prisoners which were most exposed to the influence of cold, from the lower temperature of the cells in which they pass the night; showing that where both causes most conspicuously concurred, the disease was most extensively produced. Yet those individuals of that class, who, sleeping in the same cells, and exposed to the same low temperature by night, were employed in the kitchen by day, and had access to richer diet, were universally exempt; showing, that where one cause was withdrawn, the other was of itself inadequate to produce the disease."

One remarkable peculiarity seems to have escaped them



altogether. Why were the women more affected than the men, who, if the diet had been the main cause, must obviously have suffered most? The only hypothesis that will account for all the phenomena is, that the cold was the main cause; for the prisoners employed in the kitchen, being the whole day in a warm atmosphere, were so much the better able to resist the temperature of their cells. But it is clear to demonstration that the diet was not the cause. The physicians substituted a good diet, including meat, rice, white bread instead of brown, and three oranges a day as an antiscorbutic; and concluded by expressing "a firm conviction that there was no obstacle to the entire re-establishment of the prison," when lo and behold the disease broke out again, and Dr. Latham fairly owns that he is compelled to doubt the accuracy of their former conclusions.

"Dr. Latham, p. 22.—'The conviction it (the Report) expresses that there is 'now no obstacle to the entire re-establishment of the healthy state of the Penitentiary' was proved, by what speedily occurred, *not to have been well founded*; and although our opinion respecting the sources from which the disease was originally derived, was confirmed by numerous medical men who were examined upon the subject, and was at the time entirely satisfactory to ourselves, and equally so to the committee, facts subsequently brought to light, have led us to doubt whether this latter opinion was entirely correct.

"The Report had hardly been made public when the disease, *so far as it was referable to the bowels*, began to re-appear; by the middle of the month of May it had again pervaded the prison; and by the middle of the month of June, all the prisoners, without exception, who had formerly suffered; *and all who had been admitted since its presumed causes had been removed, were involved in the same calamity*: and the remedies formerly successful had now not the smallest beneficial influence."

If this be not enough, it is only necessary to refer to a subsequent extract, p. 124, proving that the *Narcissus* convict ship, stationed at Woolwich, was reduced, in a single month, from a state of "conspicuous" health to the semblance of a hospital, by the same disease, about the same time.

The author is averse to all experiments on the human body. Drs. Roget and Latham are of a different opinion:

"Practically, the main question seems to be, can animal food be safely excluded from prisons, and particularly from

the Penitentiary? We are aware that a large portion of the labouring agricultural population of this country subsists altogether upon vegetable food, and is generally reputed vigorous and healthy; and we admit the justice of the inference, that an exclusively vegetable diet is generally wholesome; and we allow, moreover, that to submit those confined in prisons to such a diet, is a justifiable experiment."

They thought (i. e. in their *first* Report) that there were peculiar obstacles to success in a penitentiary, but they owned that just conclusions as to food could only be deduced from numerous and careful experiments, and added, "no such experiments, as far as we know, have ever been made,"—quoted by the author in italics, by way, we suppose, of giving additional weight to their authority.

Such experiments fortunately have frequently been made since, and they afford the most conclusive evidence that this author has been hurried into the most groundless apprehensions, and a good deal of crying injustice, by his humanity.

An actuary of experience has stated, after a careful examination of the returns, that, were any benefit society to venture on the scale of premiums founded on prison experience, they would inevitably be insolvent in less than three years; and we could name a leading radical, who says that he never knew a man imprisoned for a political offence (and he has known many) who did not come out of prison a better man, physically, than he went in. It is also an ascertained fact, that the health of the prisoners in Glasgow, Edinburgh, and Salford gaols, (three prisons where the dietaries are particularly low), is better than that of any class in the neighbourhood. But we can confidently go further, and we assert that, so far as statistical calculations and experiments can be relied on, they concur in proving, that what the author of the Plea would call a wicked, dangerous, and illegal dietary, is best calculated to promote the health and well-being of the prisoner.

In the Fifth Report of the Inspectors for Scotland, the results of a curious experiment, tried during 1840 in the Glasgow Bridewell, are detailed:

"Eight different forms of diet were prepared, and a class of prisoners was placed on each diet, and confined to it for one month. Before commencing, each prisoner was examined as to the state of

his health, and weighed; and the same was done at the end of the experiment. The following were the different diets, and the result of the various trials of them:—

“*First Diet.*—Cost, including cooking,  $2\frac{3}{4}d.$ <sup>1</sup>

“*Breakfast.*—8 ozs. of oatmeal, made into porridge, with a pint of buttermilk.

“*Dinner.*—3 lbs. of boiled potatoes, with salt.

“*Supper.*—5 ozs. of oatmeal, made into porridge, with half a pint of butter-milk.

“Ten prisoners were put on this diet, (5 men and 5 boys,) all under sentences of confinement for two months, and all employed at light work (picking hair and cotton). At the beginning of the experiment 8 were in good health and 2 in indifferent health; at the end all were in good health, and they had on an average gained more than four pounds each in weight, only one prisoner, a man, having lost in weight. The greatest gain was 9 lbs. 4 ozs., and was made by one of the men. The prisoner who was reduced in weight had lost 5 lbs. 2 ozs.

“*Second Diet.*—Cost, including cooking,  $2\frac{3}{4}d.$

“The only difference between this diet and the last was the substitution of a third of a pint of skimmed milk at breakfast for a pint of butter-milk.

“Five young men and five young women were put upon this diet, some of whom had been in prison for several months. The men were employed at net-making, two of the women at weaving, and three of the women at winding and twisting. The result of the experiment on this diet was similar to that on the last, and was so far confirmatory of it. All were in good health at the beginning of the experiment, and all in good health at the end. On an average, each prisoner gained rather more than 4 lbs. in weight, the greatest gain being  $12\frac{1}{2}$  lbs., (by a woman), and the only loss (also by a woman) being 1 lb. All the prisoners liked this diet; but they said they should prefer having it twice a week only to having it every day.”

In the third, the only change was baked potatoes instead of boiled. All remained in good health, but the prisoners disliked the baked potatoes, and there was a slight loss in weight.

In the fourth, the only change was in the dinner, which

<sup>1</sup> “The cost of the different diets was calculated according to the prices of food at the time the experiment was made (February, 1840); at the ordinary prices of food the cost would be lower.”

consisted of potato-soup, containing a  $\frac{1}{4}$  lb. of meat. All the prisoners disliked this diet: their health was good, but there was a slight loss in weight, about  $1\frac{1}{4}$  lb. on the average.

*“ Fifth Diet.*—Cost, including cooking,  $4\frac{1}{8}d$ .

*“ Breakfast and supper, the same as in the first diet.*

*Dinner.*—Half a pound of meat and a pound of potatoes.

*“ This was the most expensive of all the diets; nevertheless, it will be seen that its effects on the health of the prisoners was not so satisfactory as that of some of the other diets; nor was this diet generally liked by the prisoners, all in the class, except five (of whom four were females); preferring the ordinary prison diet, which, with variations in quantity according to the different kinds of work, &c. is the same as the seventh diet.”*

*Sixth Diet.*—Cost, included cooking,  $3d$ .

*Breakfast.*—The same as in the first diet.

*Dinner.*—1 lb. of bread.

*Supper.*—1 lb. of potatoes.

Health good, and a gain of  $2\frac{3}{4}$  lb. each in weight, but the diet disliked.

*Seventh Diet.*—Cost, including cooking,  $3\frac{1}{4}d$ .

*Breakfast and Supper.*—The same as in the first diet.

*Dinner.* — 2 pints of broth, containing 4 ozs. of barley and 1 oz. of bone, with vegetables; also 8 ozs. of bread.

Health good, but a loss in weight of half a pound each person on the average. This, it is observed, is very much like the ordinary diet of the prison.

The eighth is the most curious of the whole. It consisted entirely of boiled potatoes—2 lbs. for breakfast, 3 lbs. for dinner, and 1 lb. for supper. The inspector says:

*“ A class of 10 young men and boys was put on this diet. All had been in confinement for short periods only, and all were employed at light work, teasing hair. At the beginning of the experiment eight were in good health and two in indifferent health; at the end, the eight continued in good health and the two who had been in indifferent health had improved. There was, on an average, a gain in weight, of nearly  $3\frac{1}{2}$  lbs. per prisoner, the greatest gain being  $8\frac{1}{2}$  lbs., by a young man, whose health had been indifferent at the be-*

ginning of the experiment. Only two prisoners lost at all in weight, and the quantity in each case was trifling. The prisoners all expressed themselves quite satisfied with this diet, and regretted the change back again to the ordinary diet.

“ Upon the whole, the prisoners who were put upon these different diets increased in weight and improved in health, the females improving most, and gaining most in weight. How far any one of these diets would prove to be superior to the others in a long experiment, and with prisoners of different ages, employed at different kinds of work, and confined for different periods, I cannot say; but so far as a trial of one month can be depended upon, *it would appear that the cheaper diets, and those containing no other animal food than milk, are the best.*”

Now for statistics. Mr. Chadwick, after observing that our agricultural labourers, notwithstanding many defects in their modes of life, are comparatively a strong and healthy race, says: “ This being so, the question presented itself whether an increased amount of food to those who had less labour—namely, paupers and prisoners—was requisite to maintain a fair average degree of health amongst them.” One of the modes adopted by this acute investigator was to analyze the gaol returns, 104 being complete enough for the purpose. He took the twenty gaols where the expense and quantity of the diet were the lowest, the twenty where they were highest, and the twenty where they were intermediate. In the lowest, the sick were 3 per cent.; in the intermediate, 18; in the highest, 23½. The deaths were respectively one in 622, 320 and 266. He subjected the returns for different years to the same analysis, and the result varied very slightly. He then submitted the tables to Mr. Farr, the surgeon and medical statist, who combined the facts differently, and confirmed the conclusion. “ According to this (Mr. Farr’s) mode,” says Mr. Chadwick, “ it appears that the attacks of sickness increase progressively with the increase of the dietaries. The mortality varies very little, but it is the highest where the diet is full. I might venture to assume from these facts, at least, that the sickness is increased as the quantity of food is increased; at all events, that the lowest actual dietaries have no deteriorating influence on the health of the

prisoners. I submit these facts, however, as establishing a case for further inquiry. I do not deny the existence of any countervailing facts, though I am aware of none."<sup>1</sup>

We are quoting from a little Essay, which should be studied by every one who ventures to discourse concerning prisoners or the poor. The author of "The Plea," in particular, will be surprised to find his favourite weapons,—appeals to feeling, wrested from his grasp and turned against him—

"In 1820, the deaths by the executioner were 46; by apparent excess in the supply of food, 96. It must also be recollected that a large proportion of the prisoners amongst whom this sickness and death falls are untried, and that many of them would probably be discharged as innocent, and many of them are confined on sentences of a few days' or a few weeks' imprisonment. Whilst it appears that prisoners may be maintained in a state of health with no more than 3½ per cent. of sickness, and a mortality of 1 in 635, what can be said if no efforts are made for the discontinuance of a system, in which a prisoner, in addition to his sentence, is in fact subjected to a forced lottery, in which 23 lots out of every hundred entail a fit of sickness, and amidst every 266 there is one fatal ticket—a sentence of death?"

Yet, for humanity's sake, forsooth, no experiments "on the human body whilst yet alive" are to be tried; in other words, no such experiments at all. This is philanthropy with a vengeance. Still it does seem to us, that no prudent man need be ashamed to avail himself of the knowledge obtained by others, however little he may approve their methods of obtaining it. The most squeamish surgeon would gladly benefit by Dr. Magendie's observations, though he would rather see the whole human race suffer than subject an innocent and healthy dog to the scalping knife; and we cannot help thinking that our author should have given due weight to what might be said on the other side, before charging numerous bodies of respectable men with "wicked, dangerous, and illegal" practices. Hath not a magistrate eyes? Hath not a turnkey hands, organs, dimensions, senses, affections, passions? If you prick them, do they not bleed?

<sup>1</sup> *An Essay on the Means of Insurance, &c. &c.*, published by Charles Knight in 1836.

There are facts, moreover, which might assist to modify such rash conclusions, lying within every body's reach. The long room at Eton, or the lower deck of a man-of-war, may suggest a doubt whether a separate sleeping apartment is absolutely necessary to health: a passenger's cabin in a steam-boat is a very small cell; and Dr. Johnson used to say that a ship was a prison, with the addition of danger. A medical man, who lately had occasion to investigate the condition of the poor in Edinburgh, states that, in some of the wynds and closes, he found numerous families living in unfurnished apartments, so badly ventilated, that he frequently turned sick on entering them. As for medical attendance, it is well known that poor persons in a state of disease have been committed to prison in the northern Athens, that they might be taken care of. Unglazed windows have been mentioned as the worst of hardships, yet, in many parts of the country, hut after hut may be pointed out, such as Lord Chatham had in his mind's eye when he exclaimed: "An Englishman's house is his castle—not that it is surrounded by walls and battlements—it may be a straw-built shed, every wind of heaven may whistle through it, every element of nature may enter it, but the king dare not."

Then is not the capacity of man's frame to resist hunger, hardship, and fatigue notorious? and do not Voyages and Travels teem with well authenticated accounts of shipwrecked mariners subsisting for months upon scraps of biscuit, and adventurers walking hundreds of leagues with nothing but moss, berries, or an old pair of boots, to subsist upon? We all remember the story of the corporal, who said that the only time he got a good meal was when he was set to break biscuits for the Duke's hounds; and there can be no doubt that during a great part of the Peninsular war, our soldiers were much worse fed than the soldiers in Preston gaol.

These things may prove nothing, but they suggest a great deal; they suggest that persons confined in lofty well-aired buildings, compelled to habits of cleanliness, working less, better fed, and more regularly supplied with medical attendance, than the common run of labourers, incur little risk of having their constitutions ruined by low diet, exposure or neglect.



Mr. Chadwick may be abused, but he will not easily be answered, when he says :

“ I do not see how it can be reconciled to any sound principle of administration, that either paupers or felons should enjoy heavy dietaries with meat, whilst to a large proportion of the people of the three kingdoms even bread is a luxury. ‘ But why always the dearest grain ? why white bread for the worst class of population—namely, felons—whilst soldiers live well on brown bread ? Why always, and at all events, bread ! Is bread everywhere a necessary article ? I may ask in the words of a late eminent philanthropist ? ‘ The bulk of the people in Scotland live on oatmeal ; the labouring population of Ireland live not even on brown bread, but on potatoes. Are the Irish a puny race ? Has the arm of the Highlander been found weak in war ? Is the lesson to be held out to the great bulk of the population, that the food with which *they* are content, is not good enough for indolent able-bodied paupers, or even for felons ? ’ ”

The author of “ *The Plea* ” is equally positive as to the effects of solitary confinement, and with little better foundation, as we shall take an early opportunity of shewing. His sketch of the imprisoned ploughman, in his Preface, is simply a clever fancy piece, and will hardly weigh down a calm statement by a clergyman speaking from experience. The chaplain of the Preston County House of Correction says :

“ The effects so far visible of the plan of solitary confinement have been, to my mind, highly satisfactory ; although strict non-intercourse, the principle essential to the full developement of its benefits, is not yet enforced. But even under all the disadvantages incident to a first and imperfect trial of its power, the individual separation of prisoners has, I rejoice to say, operated in many cases most beneficially. It might indeed be expected to work well in comparison with the ordinary imprisonment of the gaol ; for in the latter case the newly-sentenced convict is placed in a ward or upon the tread-wheel, where there is either no supervision at all, or merely a formal one, and where the prisoner is left to all the evils of an unbridled intercourse with ‘ spirits more wicked than himself. ’ In the former case he is removed from the



court of justice; while the solemnities and anxieties of his trial are still sobering and saddening his mind, into a solitary cell, where, left alone with his own thoughts, he may reflect upon his crime and its consequences, and weigh the pleasures of sin against the pains which follow, undisturbed by the jeers and scoffs of the hardened and irreclaimable. The plan at present adopted is, as already intimated, incomplete, and may undergo some beneficial changes, especially as the inspector of prisons for the district has not yet given the certificate which will authorize the cells to be used for any longer period of confinement than one month. As the routine now exists, the prisoner is enabled to take an hour's exercise daily, in silence, under the inspection of an officer; he attends prayers every morning, and also the services of the Sabbath; while such as are unable to read have the benefit of the schoolmaster's instruction. Three or four days elapse after they have received their sentence before I visit them; but when I do enter their cells with copies of the Holy Scriptures or other suitable books, it needs hardly be said that my presence is evidently very acceptable to them; and I seldom take leave of the better disposed without an earnest request that I will repeat my visit at an early period. During the conversations which take place at those interviews, the prisoners in many cases have shown that softening of the heart which is evinced by tears. \* \* \* \*

"I have generally inquired from the solitaries at the beginning of their confinement whether they preferred separation or the wheel. The most frequent answer has declared a preference to solitude; though in some few cases a wish to be placed on the wheel has been intimated. This latter inclination disappears however as time goes on. A young man of 22 convicted of a trifling offence, which he could never be brought to regard in its true light, observed the day before his discharge, 'at first I wished to be on the wheel, but now I am very glad I have been kept here; I am sure it will do me a great deal of good.' It will be recollected that many convicts have been sentenced to two months' imprisonment, the first and last three weeks being in solitude, and the interval, of course, being passed on the wheel. I have been appre-

hensive—and I am so still—that this short period of intercourse with other prisoners might dissipate the good effects of the previous separation; and I expressed these fears to one of the more orderly of the prisoners when he returned to solitude; he said in reply, ‘No, sir, we had nothing to do with the other prisoners, we kept ourselves to ourselves.’ ”

The author of “*The Plea*” construes the term “solitary” in its strictest sense, and argues as if the prisoner never saw a human being from one end of the period to the other.

*H.*

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ART. IV.—STAMP DUTIES ON CONVEYANCES AND MORTGAGES.

WE make no apology for again bringing before our readers some questions relative to the stamp duties on conveyances and mortgages, for a subject more interesting to practical men there cannot be. Besides, as the stamp laws will probably be reconsidered at no distant period, it is important that all questions which have arisen in practice on the present act should be brought forward.

This Indenture made the 11th day of November, in the year 1838, between John Foot of East Newton, in the county of Northumberland, Esq., of the first part, William Flint of the borough and county of Newcastle-upon-Tyne, builder, and Robert Rowe of the same place, builder, of the second part, and Thomas Cant of Newcastle-upon-Tyne aforesaid, gentleman, a trustee for the purposes hereinafter mentioned and named, by and on behalf of the said John Foot, of the third part, Witnesseth, that the said John Foot being seised of the messuages and other hereditaments hereinafter described and expressed to be hereby granted and released for a sole estate of inheritance in fee simple, hereby contracts with the said William Flint and Robert Rowe for the absolute sale thereof to them at or for the price or sum of 6,100*l.*, to be paid at the times and in manner hereinafter mentioned, that is to say, the sum of 500*l.* on the 11th day of November instant, the sum of 1,000*l.* on the first day of May next, the

sum of 1,400*l.* on the 1st day of May which will be in the year 1840, the sum of 1,000*l.* on the 1st day of May, 1841, the like sum of 1,000*l.* on the 1st day of May, which will be in the year 1842, and the sum of 1,200*l.* on the 1st day of May which will be in the year 1843. And it is also agreed by and between the said John Foot, William Flint, and Robert Rowe, that it shall be lawful for them the said William Flint and Robert Rowe forthwith to enter into possession of the said hereditaments and to occupy the same without paying any rent therefore, but that they shall pay interest on the said purchase money at and after the rate of 3*l.* 15*s.* for every 100*l.* by the year, by equal half-yearly payments in every year, save and except that no interest shall be paid for or in respect of the said two first mentioned instalments of 500*l.* and 1,000*l.*, if the same shall be respectively duly paid as aforesaid. And save and except that the interest for or in respect of the remaining instalments shall not commence or begin to run until the first day of May now next ensuing ; and provided that in case any default shall be made in payment of the said several instalments or any of them, or of such interest as aforesaid or any part thereof respectively, at the times when the same ought to be respectively paid as aforesaid, then it shall be lawful for the said John Foot, his executors, administrators or assigns, to require, and in such case the said William Flint and Robert Rowe, their executors, administrators, or assigns shall make payment of interest after the rate of 5*l.* for every 100*l.* by the year, for or in respect of the sum for the time being remaining due. And it is hereby further agreed, that the said John Foot shall not be required to deduce or prove any further title to the said purchased premises than hath been deduced and proved according to the abstracts thereof already delivered to the solicitor of the said William Flint and Robert Rowe. And it is agreed by the said William Flint and Robert Rowe, that the said purchase money shall be paid by them in equal moieties, and that they shall be equally interested in the said premises so contracted for as aforesaid. And whereas it is probable that the said William Flint and Robert Rowe may sell the whole or portions of the said premises, so contracted for as

aforesaid, as and for building sites, or in lots or portions, and they may wish upon payment to the said John Foot, his executors, administrators, or assigns, of the monies arising from the sale of such building sites, lots or portions, or parts thereof, to obtain a conveyance of the same before the whole of the said purchase money of 6,100*l.* with interest is fully paid. And whereas the said John Foot being desirous of facilitating the purpose and object of the said William Flint and Robert Rowe, and of being exempt from the trouble of concurring in any conveyances to or sub-sales to be made by the said William Flint and Robert Rowe, hath agreed with their privity and consent to convey the premises so contracted for as aforesaid to the uses and in manner hereafter expressed. Now this Indenture further witnesseth, that in pursuance of the said agreement in this behalf, and in consideration of the sum of 5*s.* sterling paid to the said John Foot by the said Thomas Cant upon the execution of these presents, the receipt whereof is hereby acknowledged, the said John Foot doth by these presents grant, bargain, sell and release unto the said Thomas Cant and his heirs (in his actual possession, &c.) *all* those messuages, &c., To hold the said messuages &c. unto the said Thomas Cant and his heirs, to the uses following, that is to say, to such uses and upon and for such trusts, intents and purposes as he the said Thomas Cant, or his executors or administrators within twenty-one years after his death, shall from time to time or at any time by any deed or deeds appoint: And in default of, and until such appointment, to the use of the said Thomas Cant, his heirs and assigns for ever, in trust nevertheless for the said John Foot, his heirs, and assigns, subject to the said contract so entered into by him with the said William Flint and Robert Rowe as aforesaid. Provided always, and it is hereby expressly agreed and declared, that it shall be lawful for the said Thomas Cant, his executors or administrators, without any further or other authority or consent of or from the said John Foot, his heirs or assigns, to appoint or convey the said hereditaments and premises expressed to be hereby granted and released to the said William Flint and Robert Rowe, their heirs, and assigns, in equal shares as tenants in common, or otherwise as they as to their respective moieties shall direct,

upon payment of the remaining part of the said purchase money or sum of 6,100*l.* with interest, at the times and in manner hereinbefore mentioned, or to appoint or convey any building sites, lots or portions to the said William Flint and Robert Rowe, or to such person or persons as they or their respective heirs or assigns shall direct, upon payment of such a sum of money as the said Thomas Cant, his executors or administrators shall deem competent or sufficient, the said sums of money respectively being received by the said Thomas Cant, his executors, or administrators, in part payment of the instalments of the said purchase money or sum of 6,100*l.* then due or accruing due and the interest thereof, according to the said agreement hereinbefore recited. Provided always, and it is hereby agreed and declared by the said John Foot, that the receipt or receipts of the said Thomas Cant, his executors or administrators, or other the trustees or trustee for the time being of these presents, shall be a good and effectual release and discharge for all or any part of the said purchase money or sum of 6,100*l.* remaining due, and for all other the monies, if any, which shall come to his or their hands by virtue of these presents. And that the person or persons paying any such monies and taking such receipt or receipts for the same as aforesaid shall not afterwards be obliged to see to the application or be in anywise answerable for the loss, misapplication, or non-application of the monies in such receipts expressed to be received. And that no purchaser of the aforesaid hereditaments or any part thereof shall be bound to ascertain or inquire into the validity or propriety of any such appointment or conveyance as aforesaid. And the said William Flint and Robert Rowe do hereby for themselves jointly and severally, and for their respective heirs, executors and administrators, covenant with the said John Foot, his executors and administrators, in manner following (that is to say), that they the said William Flint and Robert Rowe, their heirs, executors, or administrators, or some or one of them, will pay or cause to be paid unto the said John Foot, his executors, administrators or assigns, the said instalments remaining due of the said purchase money or sum of 6,100*l.*, with interest as aforesaid, upon the days and at the times and in manner and form mentioned in the herein-

before recited agreement. Provided always, and notwithstanding anything hereinbefore contained, it is hereby expressly agreed and declared, that in case default shall be made by the said William Flint and Robert Rowe, their heirs, executors, administrators or assigns, in payment of the said instalments of the said purchase money or sum of 6,100*l.* remaining due as aforesaid, or of the interest thereof respectively, or of any part of the said principal and interest monies respectively when the same ought to be paid, according to the agreement hereinbefore recited; that then and in such case, at any time or times thereafter, it shall be lawful for the said John Foot, his heirs, executors, administrators and assigns, or any of them, without any further or other authority or consent of or from the said William Flint and Robert Rowe, their heirs or assigns, or any of them, but subject to and without prejudice to any conveyance which may have been previously made by the said Thomas Cant, his executors or administrators, under the power for that purpose hereinbefore contained, to sell and absolutely to dispose of the said several messuages, &c. [Power of Sale.] And it is hereby agreed and declared that the monies to arise by such sale or sales as last aforesaid shall in the first place be applied to pay and satisfy the charges and expenses of such notices and advertisements and other charges relating thereto, and the costs and charges of preparing for and making and which shall otherwise attend such sale or sales, and all other costs, charges and expenses which an unpaid vendor is entitled to recover or retain on a re-sale by him of the premises contracted for; and in the next place, towards payment of such parts of the said purchase money as shall from time to time be in arrear and unpaid, and of the interest of such arrears respectively; and after the payments and deductions aforesaid, the surplus, if any, of such sale monies shall be paid to the said William Flint and Robert Rowe, their respective heirs, executors, administrators, or assigns, in equal shares. And the said John Foot hereby for himself, his heirs, executors, and administrators, covenants with the said Thomas Cant, his heirs, cestuis que use, and assigns, &c. [Usual covenants for title.]

In witness, &c.

The deed stated above is only stamped as a conveyance

not otherwise charged. Mr. A. B.'s opinion is requested—Whether the stamps specified in the margin of the first page are sufficient for a deed of that description.

*Opinion of A. B.*

I think that the stamps are insufficient. I think that the deed operates as a mortgage to Mr. Foot, and as a conveyance on a sale of the equity of redemption to Messrs. Flint and Rowe, and therefore that it ought to have had ad valorem stamps for a sale and mortgage; the deed is ingeniously framed with a view to evade the duty, but I do not think that the attempt has succeeded.

A. B., *Lincoln's Inn*, 26th December, 1840.

*Opinion of C. D.*

I have perused the accompanying copy indenture of 11th November, 1838, and having the misfortune to differ from Mr. A. B. as to the stamp duty with which it should be impressed, I must state my reasons at greater length than usual, and Mr. A. B. not having assigned any particular reason for his opinion, it is necessary to review the whole subject.

I must first refer to the principle which has been adopted in construing the stamp laws. Acts of Parliament imposing duties are so to be construed as not to make any instrument liable to them unless manifestly within the intention of the legislature.<sup>1</sup> It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language,<sup>2</sup> and the language of the Stamp Acts must be interpreted according to its ordinary meaning and acceptance.<sup>3</sup>

But the Stamp Acts, besides creating a charge upon the subject, impose very heavy penalties and forfeitures in case of non-compliance with their provisions (see 48 Geo. III. s. 22 et seq.), and on this ground should be strictly construed.<sup>4</sup>

1st. Whether the accompanying deed should have an ad valorem conveyance stamp?

<sup>1</sup> Per Lord Tenterden, C. J., 6 Barn. & Cr. 542; S.P. 2 Barn. & Ad. 869.

<sup>2</sup> Per Bayley, J., 4 Barn. & Cres. 245.

<sup>3</sup> Blandy v. Herbert, 9 Barn. & Cr. 396.

<sup>4</sup> Dwarris on Statutes, 737, 749.



The deed contains a contract by John Foot to sell to Messrs. Flint and Rowe, and then a conveyance by John Foot to Thomas Cant, in trust for him, John Foot.

By the present Stamp Act, 55 Geo. III. c. 184, schedule, title Conveyance, an ad valorem conveyance stamp is imposed upon any deed upon the sale of property whereby the same is conveyed to or vested in the purchaser. It really seems to me very clear, that the deed in question does not in any sense convey the property contracted for to the purchasers or vest the same in them; on the contrary, it expressly conveys it to Thomas Cant, in trust for John Foot, the vendor, subject of course to the previous contract. It is true that the purchasers by the contract can, upon payment of the monies, require a conveyance, but it has been expressly decided that an instrument which confers a right to call for a conveyance, does not require an ad valorem conveyance stamp.<sup>1</sup>

2nd. Whether the deed should have a mortgage stamp.

The purchasers agree to pay for the property 6,100*l.* by instalments. The Stamp Act carefully expresses when an instrument shall have a mortgage stamp, and the act "cannot apply to instruments not specifically designated therein."<sup>2</sup>

The act says, that an instrument shall have a mortgage stamp where it is made as a security for the payment of any definite and certain sum of money advanced or lent at the time or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid. These definitions are clear and precise; they comprise a present loan, a previous or present debt, being payable, and the repayment of a future advance or payment to be made by the mortgagee. None of these definitions, I think, touch the present transaction. The words which come nearest are "forborne to be paid, being payable;" but it is impossible to say that the deed in question constitutes a present and forborne and payable debt.<sup>3</sup> These definitions decide the question, and it cannot be affected by the power given to the vendor to sell the premises in case of non-pay-

<sup>1</sup> *Wilmot v. Wilkinson*, 6 Barn. & Cr. 506. See dictum per Bayley J., in 510, and affirmed by the Court, post.

<sup>2</sup> Per Lord Tenterden, C. J. 2 Barn. & Ad. 869.

<sup>3</sup> See *Beete v. Bidgood*, 7 Barn. & Cr. 453.



ment of the purchase money, and indeed almost every agreement for purchase reserves such a power to the vendor.<sup>1</sup>

Upon the whole I am clearly of opinion, with a very sincere respect for the learning and ability of Mr A. B., that the deed in question required only the common deed stamp.

C. D., September 21, 1841.

*The Opinion of Mr. Attorney General,*

I am of opinion that the stamps upon the deed are sufficient (if the deed be *bonâ fide* what it professes to be), but if Thomas Cant was named by Flint and Rowe and the conveyance was to him by their direction, then, I think, the stamps would be insufficient. It must however, I think, be taken *primâ facie*, that the deed correctly states that Cant was named by Foot, and that the conveyance to Cant was for the avowed object stated in the deed.

If instead of conveying to Cant in trust, Foot had reserved to himself the receipt of the money and the execution of sub-contracts or sales (if any), I think it is clear the deed would have been sufficiently stamped; and as a contract of sale, but not a conveyance, and as reserving a power of sale, in other words making the contract *pro tanto* void in case of Flint and Rowe not complying with the contract, which would not have been a mortgage, it would not have required a higher stamp, and I cannot see on what ground the mere substitution of Cant for Foot in carrying the contract into effect can require an *ad valorem* duty, and it seems to me that the whole effect of the instrument is nothing more than a substitution of Cant for Foot in carrying out the intention of the parties. I cannot, however, state this opinion, opposed as it is to Mr. A. B.'s, without some hesitation, and it would have been more satisfactory to me had I known the grounds of the different views which he has taken of the case.

FRED. POLLOCK, Temple, 29th Sept. 1841.

*Further Opinion of Mr. A. B.*

1st. As to the instrument requiring an *ad valorem* stamp as for a conveyance: In the case of *Wilmot v. Wilkinson* there

<sup>1</sup> See Common Form of Agreement in Appendix to Sugden's Vendor and Purchaser.

had been only an agreement and no conveyance; in the present case the estate is conveyed to a trustee on behalf as well of the purchaser as of the vendor, for it is to be observed that the deed does not state that the trustee is nominated by the vendor alone, and I think that this is not necessarily to be inferred, and the conveyance is made to effectuate the wishes of the purchaser. The conveyance is made to the trustee in trust for the vendor, subject to the contract; but I think that, notwithstanding that declaration of trust, a Court of Equity would treat the trustee not merely as a trustee for the vendor, but also a trustee for the purchaser, for I think that the provision empowering the trustee to convey to the purchaser would be considered directory so far as it provides for the case of the whole of the purchase money being paid; and I think that the trustee could not in such case be considered in a Court of Equity merely as a substitute for the vendor. The purchasers' relief in equity would not, I conceive, be a bill for a specific performance of a contract, but a bill for a conveyance from a trustee. It appears to me that the case is in substance the same as a contract accompanied with a conveyance to a trustee in trust for the vendor, with a proviso that on payment of the money on a given day the trustee should convey to the purchaser, which would, I apprehend, be clearly a conveyance on purchase and a mortgage in one deed.

2nd. As to the instrument requiring a mortgage stamp: If, as was probably the case, there was a contract binding on the purchaser previously to the execution of the deed in question, the words "previously due and owing" in the Stamp Act would apply. It is to be observed that the deed itself refers in several instances to the *hereinbefore recited agreement*. I think that the words "or forborne to be paid, being payable," would probably be considered to apply. There is a present debt payable in futuro, and it is, I think, not clear that the words in question only provide for the case of a debt being due, and the creditor giving the debtor time to pay it; that case is provided for by the words "previously due and owing." If Mr. C. D.'s construction of the act be correct, it would seem that it would never be necessary to put a mortgage stamp on a conveyance or sale where part of the purchase money remained on mort-

gage of the estate sold, and when there was no separate contract, although the vendor was clearly constituted a mortgagee. The case of *Beete v. Bidgood* did not arise on the Stamp Act. Altogether it appears to me that these questions are of too much nicety for a purchaser to be advised to dispense with the stamps.

A. B. *Lincoln's Inn*, Nov. 1, 1841.

We cannot concur in the argument in the opinion last stated, and we think the view adopted by the Attorney General undoubtedly correct. Mr. A. B. contends that a conveyance stamp is required, because Thomas Cant was not merely a trustee for the vendor but also a trustee for the purchaser. Admitting this to be so for the sake of argument, which however is contrary to the fact, as we shall presently show, a conveyance stamp would notwithstanding be unnecessary, for that stamp is only required by the act upon the deed whereby the property sold, is conveyed to or vested in the purchaser or some other person by his direction. Now these words, it is clear, would not be satisfied, assuming the property had been conveyed to Thomas Cant, partly in trust for the vendor and partly for the purchaser; but the fact is that the deed expressly describes Thomas Cant to be "a trustee named by and on behalf of the said John Foot," which appears to have been overlooked by Mr. A. B., unless, indeed, he insists upon the omission of the word "alone," which, however, would be criticism too minute to be regarded, and quite contrary to the spirit of the decisions on the Stamp Acts; and the assertion of the deed that Thomas Cant was named by and on behalf of John Foot, is fully borne out by the facts; for John Foot not only intrusts him with the legal estate, but also gives him power to receive the whole of the purchase money, a sum exceeding 6,000*l.*, and further empowers him to convey building sites upon payment of such sums as he should deem reasonable, and till the whole of the purchase money is paid Thomas Cant holds the property for John Foot, and for him alone.

How it is possible in the face of these facts to contend that the deed constitutes Thomas Cant a trustee in any sense, and

in any degree, for the purchasers, we really cannot comprehend; and it is the provisions of the deed and not any equities that may ultimately arise out of those provisions through the subsequent acts of the purchasers, that must determine the question as to the stamp. Mr. A. B. urges, that, if after payment of the whole of the purchase money Thomas Cant refused to convey, the purchasers' remedy would be, not a suit for a specific performance, but a suit for a conveyance of the legal estate; there is not much difference between these remedies, but we doubt whether a Court of Law, the proper tribunal for the decision of such a question, would listen to such an argument, and we must say that we also doubt whether it has any weight; for suppose that an owner seised in fee were to contract to sell for a certain price, payable at a future day, and that it was declared in the contract that the title was accepted, as in the present case, and that nothing remained to be done but the payment of the money and the conveying of the property, and that then the purchaser paid the money but the owner refused to convey, the remedy of the purchaser, we apprehend, would be simply a suit to compel a conveyance of the legal estate, and yet no one could say that therefore the contract required to be stamped as a conveyance. If the conveyance to Thomas Cant had been in a separate instrument, the case would have been similar to that of *Wilmot v. Wilkinson*, and we cannot think that there is any difference between the two cases in point of principle. The deed merely puts Thomas Cant in the place of the vendor, as observed by the Attorney General, and that certainly is not a conveyance to the purchaser, or to a person by his direction, as expressed in the Stamp Act.

Secondly, as to the mortgage stamp:

Mr. A. B. seems to think it may be inferred that there was a contract binding on the purchasers previous to the execution of the deed in question. We cannot think it important whether there was or not; for the parties were competent to rescind any former contract and begin afresh; and it is undoubtedly clear that a Court will *infer* nothing in favour of the stamp duties, it can only decide upon what it finds within the four corners of the instrument. A deed may be full of falsehood and fraud, but that cannot affect the question as to the stamp

duty.<sup>1</sup> The parties may have rendered themselves liable to penalties, but that is another matter. We believe, however, there never was a deed drawn more free from the imputation of duplicity or bad faith than the one before us. It states exactly and simply, without any "ingenuity," the actual intention and object of the parties, and it endeavours to carry the same into effect directly and without any circuitous manœuvres; probably some conveyancers with the same facts before them might have recommended, first, a conveyance to the purchasers; and then a mortgage by them for securing the unpaid purchase money; but such a proceeding however authorized by the practice of some, would not have been exactly consistent with the facts and truth. The deed in question, then, stating a present contract, it could not be contended that it showed a previous debt. As to the words of reference "hereinbefore recited agreement," they are perfectly correct, for the word "recited" does not mean merely that which is ushered in by the word "whereas" but any thing mentioned or stated previously. We confess we are astonished at the attempt made to make the expression "forborne to be paid, being payable," applicable to a future debt. How a debt payable *in futuro* can in any sense be said to be "forborne to be paid," we cannot imagine; the expression "forborne to be paid, being payable," refers to a sum of money which the debtor has neglected or omitted to pay, though payable presently. A Court is never astute in bringing the transactions of parties within the words of the Stamp Act,<sup>2</sup> and certainly never perverts those words for such purpose. If Mr. A. B.'s opinion is correct, every contract in writing upon the sale and purchase of an estate, whether under seal or not, which provides that the vendor shall have the power of reselling the property in case of non-payment of the purchase money at the time stipulated; requires a mortgage stamp. His opinion expressly goes to that extent, and indeed the present case, as to this point, is exactly such an agreement and nothing more.

We admit that according to our construction of the Stamp

<sup>1</sup> See Lord Tenterden's judgment in *Doë v. Lewis*, 10 Barn. & Cr. 674.

<sup>2</sup> See the case of *Barker v. Smark*, 7 Mee. & Wels. 590.

Act it is not necessary to have a mortgage stamp upon an instrument, whether under seal and a deed or not; made on a sale and purchase, which merely reserves either expressly or by implication the legal dominion over the property sold to the vendor, until the whole of the purchase money is paid according to the original contract; such an instrument, indeed, is not *made* for securing any sum of money, and therefore is not a mortgage within the words of the act; its object is to secure the property to the purchaser on payment of the whole of the price; the law gives the vendor a lien or charge for the price or portion of it remaining unpaid, and a mere declaration that the vendor may resell in case of non-payment, cannot change the lien that the law gives into a mortgage debt; but conveyancers in general render a mortgage stamp necessary by their mode of dealing with the property and the contract of the parties. The case of *Beete v. Bidgood* was not upon the Stamp Act, but it contains the opinion of the Court upon the identical words used in that act; in another act of a similar nature, also like the Stamp Act imposing penalties.

It should be observed that if the opinion of Mr. A. B. is correct, many marriage settlements would be liable to mortgage stamp duty. For a father may covenant to pay a sum of money at a future time and charge real estate with the payment, and that it seems might be held to be a "sum forborne to be paid, being payable."

*W. C. W.*

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**ART. V.--ADMISSIBILITY OF EXTRINSIC EVIDENCE FOR THE  
CONSTRUING OF WILLS.**

**SEVERAL** cases have been decided within a recent period with respect to the true rule as to the admission of parol evidence in the construction of wills, and it is clear the Courts are desirous of contracting the limits which have hitherto been admitted as to the admission of such evidence. We think if reference be made to first principles, there need not be much difficulty in determining in any case, when and how parol averments may be used.

A will is a written instrument by which an owner of property directs how his estate shall be disposed of after his death, and which he does not intend shall have any operation whatever until that period. The law prescribes no particular form for such a disposition, and still less is a testator required to express his intentions in any technical language. A testator may use what terms or expressions he thinks proper, to describe either his property or the objects of his bounty, and however enigmatical, or paraphrastical, or nonsensical he may be, it is the duty of the law and its expounders to discover, if possible, the intention, and to direct the devolution of the property accordingly. A last will and testament, then, may be no more than a familiar epistle. Now, if a father were to write to two of his children absent from home, respecting his affairs, family or connections, and they, unable to understand some of his statements, were to lay the letter before a stranger for his opinion, would he not probably be unable to assist them unless much information was afforded to him respecting family circumstances? Yet such is nearly the case of every contested will. It is a private document treating of private matters, and brought before a perfect stranger for his exposition and judgment. In such a case, then, it is plainly the duty of the parties to give the Court every information in their power respecting the property, relations and friends of the testator; to produce plans and rent rolls of his estates, a pedigree of his family, and a diary of his daily intercourse. The parties may show any peculiar habits the testator might have respecting his property or the persons with whom he associated. They may show that he used to call certain lands his Ashton Estate, though part of them were without the manor



of that name. They may prove that he had adopted a particular child as his own and given him some pet name, or that he used to designate a certain individual his uncle, though there was in fact no relationship or connexion between them. Furnished with such information the judge reads the document with an intelligent mind; he sits in the chair of the writer, and understands his allusions and descriptions. To deny that parol evidence should be given of such facts would be contrary to common sense, and the judgment of the best legal authorities.

Lord Coke says "every deed consists upon two parts," that is, as he explains it, depends upon matter of fact and matter in law, or the construction of the instrument. Matter of fact is to be averred by the party and triable by the jurors; matter in law is to be discussed by the judges.<sup>1</sup> After such information is afforded, of course if the instrument is well drawn, no difficulty is experienced, but in too many cases ambiguity and obscurity are found. The Court may find an expression which applies equally to two estates or to two persons; the language is equivocal. Is the devise, then, void for uncertainty? The general rule of construction would lead to that inference, but, from the most ancient times of our law, an exception has been admitted in this instance. In this case, and in this alone, you may prove the intention of the testator by extrinsic evidence either written or merely parol. If A. levies a fine to William, his son, to have and to hold to him and his heirs, upon this fine the judge cannot make question for any matter of law, but now the party comes and avers matter of fact, and saith that A. had two sons named William, an elder and a younger, and his intent was to levy the fine to William the younger; this averment *dehors* the fine is good of this matter of fact, which well stands with the words of the fine, and shall be tried by the country. So if a man levies a fine of the manor of Soure, and in truth there is the manor of North Soure and South Soure, in this case issue may be taken *dehors* which manor the conusor intended to pass.<sup>2</sup> This is the *ambiguitas latens*, or equivocation, of Lord Bacon, and it is the only exception admitted in our best authorities, to the rule that no averment shall be received as to the intention of

<sup>1</sup> Altham's case, 8 Rep. 155.

<sup>2</sup> 8 Rep. 155; Hob 32.



a party respecting his disposition by deed or will. It is impossible to deny that this is an exception, and that the trial of it may lead to gross perjury and injustice; it is therefore not to be extended. And the same evidence which shows what was without doubt the intention of the testator, may disclose facts which render it very doubtful whether the devise would have been made, had he known the same facts. "I am not much taken with the old book case in 47 E. 3, cited in Cheney's case 5 Rep. 68, where it is held that if a man have two sons John, and devises to his son John generally, this shall be capable of an averment that he meant the younger, and it shall be good evidence to prove that averment, that the testator thought his eldest son dead, because long absent. Surely it had been more just to adjudge the will void for the uncertainty, on purpose to prevent that disherison, which it is evident the testator did not intend."<sup>1</sup> If there be an ambiguity on the face of the will, as a devise to one of the sons of J. S. who has divers, that cannot be helped by averment, and is void for uncertainty. The distinction between this and the former case is obvious. Here the written word shows that there was an ambiguity in the mind of the writer; the testator says, I give to either one or the other of the sons of J. S., I care not which; it is therefore impossible to show that the testator intended either in particular, without contradicting his express and written word, against which of course no parol declaration can be received.

But besides these cases of ambiguities latent and patent, a will either before or after the application of the usual and necessary parol evidence, may be found dark and obscure, and it is among these latter cases that our Courts have too often stumbled. Forgetting that the rule given by Lord Coke and Lord Bacon extends only to ambiguities or equivocations, that is, to a case where there is a clear devise to one or other of two persons, or of one or other of two estates, and that the parol evidence admitted of the intention stands with the words of the will, and merely applies and fixes these words, it has been contended by some that if a will is clear on the face of it and an obscurity only arises when the circumstances of the testator or of his property are known, that in such case the difficulty

<sup>1</sup> Nurse v. Yerworth, 3 Swanst. 612.

having been discovered by the admission of parol evidence, may if possible be removed by the same means. The admitted rule and doctrine, however, cannot be so extended without destroying fundamental principles, without building upon words instead of writing. In a late case<sup>1</sup> Lord Abinger, C.B. thus expounded what we consider the true doctrine on this subject. "It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is, to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate and often necessary evidence to enable us to understand the meaning and application of his words.

"Again,—the testator may have habitually called certain persons or things by peculiar names, by which they are not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.

"But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like

<sup>1</sup> Doe v. Hiscocks, 5 Mee. & Wels. 363.

nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to the expressions that are unmeaning or ambiguous.

“ Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator’s words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express.

“ Thus if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls “ an equivocation,” i. e., the words equally apply to either manor, and evidence of the previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do, and when you know that, you immediately perceive that he has done it by the general words he has used, which in their ordinary sense may properly bear that construction.

“ It appears to us that, in all other cases, parol evidence of what was the testator’s intention ought to be excluded, upon this plain ground that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by the circumstances, there is no will.”

We will now refer to some of the cases. In *Doe v. Morgan*,<sup>1</sup> there was a devise to “ my nephew, Morgan Morgan,” and in the next sentence another devise to “ my nephew, Morgan Morgan, of Mothvey,” and these were followed by devises to “ the above said Morgan Morgan.” The testator had two nephews Morgan Morgan, one living at Mothvey and the other near Merthyr Tydfil. Parol evidence of the testator’s declarations were received to show that the first devise was intended for Morgan of Mothvey. The only diffi-

<sup>1</sup> 1 *Crom. & Mee.* 235; see *Careless v. Careless*, 19 *Ves.* 600; *S. C.* 1 *Mer.* 384.

culty that arises upon this case is, whether the words of the will were not almost sufficient to show that the first devise was intended for a different person than Morgan of Mothvey; if so, there was not any ambiguity or equivocation, and the effect of the evidence was to insert "of Mothvey" in the will, when the document itself showed that the testator knew its importance. The condition upon which alone evidence of testator's declarations can be received should be carefully remembered,—the evidence must stand well with the will, and every part of it, it must not alter or contradict it; the words of the devise, having regard of course to the whole will, must apply *equally* to two persons or things. In *Doe v. Needs*<sup>1</sup> the ambiguity appears to have been latent and fitly holpen, except indeed the will showed that there were two persons at least of the name of "Gord" known to the testator, and consequently it might have been said that the devise to Geo. the son of Gord, was a patent ambiguity and not different from a devise to — Gord, which it was admitted could not be helped. It might, we think, have been contended that it should be presumed that every person has a christian name, and that therefore if it appeared that "Gord" was not the christian name of any person known to the testator, the devise was manifestly imperfect.

We think parol evidence of testator's declarations should not have been admitted in *Bradshaw v. Bradshaw*.<sup>2</sup> There the devise was to Robert, the second son of E. B. In fact Robert was the eldest and Henry the second son. In such a case there is not any equivocation; the description does not apply to any person living, and if the devise stands quite bare of circumstances it is void. The Court cannot, in order to make it fit, strike out "Robert," or "second," the words together make up only one designation. Parol evidence of declarations seems to be out of the question, and without that the Court could only say that one of the sons of E. B. was intended; but the context of the will might be sufficient to enable the Court to say the testator intended the *second* son. "Matter in law" might help such a devise, but not "matter in fact." In an old case where there was a devise to William the eldest son of C. P., and Andrew was the name of the

<sup>1</sup> 2 Mee, & Wels. 129.

<sup>2</sup> 2 You, & Coll. 72.

eldest, the Court, apparently by construing the will, held Andrew to be entitled.<sup>1</sup> The rule that a devise is never to be held void for uncertainty if the words of the will raise a reasonable inference that any person or property in particular is intended, applies to the foregoing cases.

So where a legacy was bequeathed to the Rev. *Charles Smith*, of Stapleford Tawney, and the incumbent's name was shown to be Richard, though there had been a Captain Charles Smith known to the testator, but who in his knowledge was dead before he made his will, the Court decreed in favour of Richard,<sup>2</sup> without evidence of any parol declarations in his favour. So, if a testator devises all his *freehold* houses in A. street, London, and has only *leasehold* houses in that street, they will pass on the "matter in law," for otherwise the devise would be wholly void and inoperative. Thus construction can alter or strike out a word, but parol evidence of declarations cannot.<sup>3</sup>

A legacy was bequeathed to Sophia Still, the daughter of Peter Still. Peter had two daughters Selina and Mary Ann. Thus the will of the testatrix described no person in existence; but it enabled the Court to say that one of the daughters of Peter in particular was intended. It was not like a bequest simply to one of the daughters of Peter, for that would have shown an ambiguity in the mind of the testatrix. The case was, then, one of an equivocation, and parol evidence of declarations was admissible.<sup>4</sup> The description was a mistake, but it applied equally to two persons.

Testator devised to his nephew Robert C., the son of Joseph C. The will contained several other devises to his nephew Robert C. generally, and one to his nephew Robert C., the son of John C. Matter in fact showed that testator had not a brother Joseph, and had two nephews Robert C., the sons of John and Thomas respectively. This enabled the Court to say, that "son of Joseph C." was a mistake, and the remainder of the description applying equally to two persons, parol evidence was held to be admissible, though none of de-

<sup>1</sup> Finch, Ch. Rep. 403; 1 Eq. Ab. 212.

<sup>2</sup> Smith v. Coney, 6 Ves. 41.

<sup>3</sup> Day v. Trig, 1 P. W. 286; Doe v. Cranstoun, 7 Mee. & Wels. 1.

<sup>4</sup> Still v. Hoste, 6 Madd. 192.

clarations appears to have been given.<sup>1</sup> Matter in law induced the Court to think that the testator intended to refer to the same nephew throughout the will, and that was a decision in favour of Robert, the son of John.

A case somewhat similar to the above lately occurred in practice. A testator bequeathed a number of small pecuniary legacies, and among others the sum of 180*l.* to his nephew Samuel Ward, son of his late brother John Ward, deceased, and afterwards 30*l.* to his nephew Samuel Ward, son of his brother Samuel Ward, to whom a legacy was also given. The evidence showed that testator had not a brother John, and he had no other nephew Samuel, than the son of Samuel; but he had a great nephew Samuel, son of a nephew John, and whom he had adopted as his own child, and to whom no legacy was given, unless the bequest above mentioned applied to him. It was urged that in this case, as in the case of every will, parol evidence was admissible to show who were the relations of the testator, and who were his associates and friends, and also the degree of intimacy or favour which existed between the testator and any other person.

In the present case the evidence shows that the testator had not a "nephew Samuel Ward, son of his late brother John Ward;" this description is not applicable to any person in existence. But a description in a will either of property or of a legatee may be inaccurate, and yet a Court may by the application of well known rules of construction be able to decide what or who was intended by the testator. If the inaccuracy is so great as not to yield to any powers of construction, the Court can only decree the devise to be void for uncertainty. The evidence shows that the testator never had a brother called John, and therefore the description, "son of his late brother John," may be rejected as a plain mistake. But suppose those words are struck out as insensible, a sufficient description of a legatee remains, "my nephew Samuel Ward." The evidence shows that the testator had a nephew Samuel Ward, the son of his brother Samuel, but the context of the will, and the reference, though erroneous, to his late brother John, seem sufficient to show that Samuel the son of Samuel was not intended. He, it will be observed, is afterwards cor-

<sup>1</sup> *Careless v. Careless*, 19 Ves. 600; S. C. 1 Mer. 384.

rectly described and a legacy is given to him, and he is not referred to as having been before mentioned. The question, then, arises whether the evidence discloses any other person who may take under the description of testator's nephew Samuel Ward; and we find that though the testator had not any other nephew called Samuel, he had a great nephew of that name, whom he had treated with great affection and had adopted as his own child, and it was contended, that without regarding in the least a declaration stated to have been made by the testator with respect to the child as not admissible as evidence, that this great nephew was entitled to the legacy in question, for he is undoubtedly a nephew of the testator and so satisfies the declaration in the will, and assuming Samuel the son of Samuel to be excluded, he is the only person who can claim under that description. If this child is not entitled, the bequest is void for uncertainty, but that is an alternative against which a Court always struggles and endeavours to find persons and property to satisfy the dispositions of the will.

In *Price v. Page*<sup>1</sup> there was a legacy to — Price the son of — Price. There was only one claimant and therefore no equivocation. It was a case of an imperfect description. It was shown that the claimant was the son of a niece of the testator; that his father and grandfather's name was Price; that the testator had no other relation of that name, that he lived on terms of affection with the claimant, contributed to his maintenance and placed him with an attorney. This evidence was clearly admissible, for it was only part of those matters of fact upon which every written instrument stands, and it was sufficient to justify a decree in favour of the claimant. But the Court went further and admitted evidence of a declaration of the testator in favour of the claimant, which was unnecessary and contrary to principle.

In *Doe v. Huthwaite*<sup>2</sup> there was a devise to *Stokeham*, the second son of S. H. and his issue, with remainder to *John*, the third son of S. H. and his issue. It was shown that *Stokeham* was the third son, and *John* the second son, and consequently that the descriptions in the will were mistakes and did not apply to any living persons; it could not be said that there

<sup>1</sup> 4 Ves. 679.

<sup>2</sup> 3 Barn. & Ald. 632. S. C. 2 B. Moo. 304.



was any equivocation. After a decision in the Common Pleas in favour of Stokeham, the Court of King's Bench decided that evidence of the state of the testator's family, and of other circumstances (not parol declarations), was admissible, as to which we think there could not be any doubt, no more than that a judge should use spectacles if he cannot see without them.

In *Doe v. Hiscocks*<sup>1</sup> the devise was to testator's grandson John H., eldest son of John H. It appeared that John H. the father had been twice married, and that Simon was his eldest son by his first marriage, and John by the second. Thus the description did not correctly apply to any known person. It was held that parol evidence of the testator's intention was not admissible.

A testator devised all his estates in the county and city of Limerick; he had property in the city but none in the county of Limerick, and parol evidence was held to be inadmissible that he intended to devise estates in the county of Clare.<sup>2</sup> Of the property which it was contended the testator intended to pass, there was not any description whatever in the will.

A testator devised his estate at Ashton in the county of Devon. Evidence was offered to show that the testator was accustomed to distinguish by the appellation of his "Ashton Estate" the whole of his maternal property, including property in several contiguous parishes; but this was rejected, the Court considering the devise of the estate *at* Ashton the same as if it had been *in* Ashton, and therefore there was neither any ambiguity or obscurity either latent or patent.<sup>3</sup> If the testator had devised his "Ashton Estate" we think the evidence would have been admissible.<sup>4</sup>

Before we conclude we must advert to the important rule, that, though parol evidence is not admissible to alter or add to a will, it may be received to show that the instrument produced as the will of the testator does not, through fraud or mistake, either in all or some of its provisions, convey his real intention and will.

<sup>1</sup> 5 Mee. & W. 363.

<sup>2</sup> *Miller v. Travers*, 8 Bing. 244. See the *Earl of Newburg v. Countess of Newburg*, 5 Madd. 364; S. C. 1 Jarm. on Wills, 553.

<sup>3</sup> *Doe v. Oxenden*, 3 Taunt. 147.

<sup>4</sup> See *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald. 550, and 3 B. & Cr. 870.



## ART. VI.—LEGAL MAXIMS.—EFFECT OF IGNORANCE.

IGNORANCE is in contemplation of law of two kinds, viz. of fact and law. (2 *Rep.* 3 *b.*) The Roman law has the same distinction. For while "*ignorantia facti excusat, ignorantia juris* (or *legis*) quod (or, according to *Hale*, eorum quæ) quisque tenetur scire, neminem excusat." (*Digest*, lib. xxii. tits. vi. ix.)

The condition of a party who, in inevitable ignorance of a material *fact*, adopts a mistaken course of action, which entails detrimental results on himself or others, is viewed with leniency by the courts. "Such ignorance *may*," says *Coke* (2 *Rep.* 3 *b.*) "excuse a party from the consequence of law resulting therefrom;" but it seems it must be ignorance in the strict sense of the term, and not erroneous calculation of an event. Thus if a man in ignorance of an act of bankruptcy previously committed by another, makes a payment under that mistake, and proves facts from which a jury would infer such ignorance on his part, he may be permitted to recover back the sum paid. But this will be otherwise, if, without any evidence to show that he was not aware of the act of bankruptcy, he made the payment on speculation that no fiat would thereafter issue: for then, if the event is adverse and the fiat issues, he cannot recover the payment; as his mistake had not reference to any fact in existence at the time he paid it. (*Harris and another, assignees, v. Loyd*, 5 *M. & Wel.* 432.) In that case, (before 2 & 3 *Vict.* c. 29,) a trader, after committing an act of bankruptcy, assigned his effects to trustees for the benefit of his creditors. They paid off an execution against his goods, which was delivered to the sheriff after the act of bankruptcy. A fiat having afterwards issued, they sued the sheriff for the money, relying on their ignorance of the previous act of bankruptcy; but as nothing appeared from which that ignorance might be inferred, the Court held that they could not recover, the payment not having been made from mistake of a previous fact, but on speculation that the assignment would pass the goods to them, without defeat by any subsequently issued fiat. (*S.C.*)

A person who pays money under a mistaken view not of law, but of facts, without however neglecting to avail himself of the means of knowledge within his power at the time, may

recover it back. (Per *Bayley*, J. 6 *Bar. & Cres.* 677.) A receiver of rents had indorsed a bill to his principal in liquidation of rent due. The latter neglecting to present it in due time, payment was refused on that account by the previous parties to it; whereupon (to prevent it from operating in satisfaction of his debt under 3 & 4 *Ann.* c. 9, s. 7) he insisted on its absolute nullity for being drawn on a wrong stamp; and called on the receiver, as his immediate indorser, to pay. The indorser's agent inspected the bill, and, seeing the stamp, as he thought, insufficient, paid the amount and received back the bill. It afterwards proved to have been drawn in Ireland, and to be properly stamped according to Irish law. The indorser then sued the indorsee for the amount, as money had and received to his use; and the court held, that as nothing on the bill suggested the place where it was drawn to have been out of England, the plaintiff was not bound to make inquiry before paying the amount; and that having so paid it in ignorance of the fact of the place where the bill was drawn, and without laches at the time of making such payment, he was entitled to recover against a party who had lost all claim on the bill by his own neglect to present it in due time. (*Milnes v. Duncan*, 6 *Bar. & Cres.* 671. See also *Moses v. Macfarlane*, 2 *Burrow*, 1005.)

The well known case of *Bilbie v. Lumley*, 2 *East*, 469, recognizes these maxims, by showing that where a payment is made with full knowledge or means of knowledge of all the facts, but under a mistaken view of the law arising on them, the paying party cannot recover the amount, for *volenti non fit injuria*. (See per *Lawrence*, J., in *Lothian v. Henderson*, 3 *Bos. & P.* 520; and per *Chambre*, J., in *Brisbane v. Dacres*, 5 *Taunt.* 143, 159). However, *Bilbie v. Lumley* goes no further. (See *arguendo*, 6 *B. & Cr.* 676, and by *Chambre*, J. 5 *Taunt.* 158.)

Settlement of an account with full knowledge or means of knowledge of the facts is the same as payment. (*Bramston v. Robins*, 4 *Bing.* 11.) It was said by *Ashurst*, J., that if a payment is made, not with full knowledge of the facts, but only under blind suspicion of the case, it may be recovered if unjustly made. (*Chatfield v. Paxton*, 2 *East*, 472, note. Also most ably stated in 5 *Taunt.* 155, by *Gibbs*, J., who had been counsel in it.)

As to the knowledge and means of knowledge of facts being presumed, so as to make a payment or other act indefeasible, the following observations of Lord Tenterden are important: "If the possibility or even probability of actual knowledge [viz. of a fact, *e. g.* a blockade] should be considered as a legal proof of actual knowledge of it as a *presumptio juris et de jure*, the presumption might in some cases be contrary to the fact, and such a rule might work injustice. - - - Such a rule (he adds) cannot be applied to the case of insurance law, and that knowledge, like other matters, must become a question of fact for decision and judgment of a jury." "The probability of actual knowledge upon consideration of time, place and opportunities of testimony and other circumstances, may in some instances be so strong and cogent, as to cast the proof of ignorance on the other side in the opinion of a jury, and, in the absence of such proof of ignorance, to lead them to infer knowledge; but still we think the inference properly belongs to them." (Per Cur. in *Harratt v. Wise*, 9 B. & Cr. 717.)

In *Doe d. Wright v. Smith*, 8 Adol. & Ellis, 264, *Patterson*, J. says, that if a defendant, who has had an opportunity of examining a document which he is called on to admit, does not trouble himself to do so, and admits it, he shall be in the same situation as if he had examined it. Money paid voluntarily, and with full knowledge of facts, *e. g.* during progress of work, cannot be recovered as had and received to the use of the payer, though the whole task is executed so ill, or so tardily completed, as to make it useless for its contemplated purposes. (*Cartwright v. Rowley*, 2 Esp. C. N. P. 723.) *Gibbs*, J., in *Brisbane v. Dacres*, 5 Taunt. 147 & 157, says, "The principle has always been this, that whenever money has been paid with knowledge of all the facts in consequence of a demand of it as of right, then, although the demand was unfounded (in point of law) the money cannot be recovered back. I think the weight of authority is so, and that the dicta which go beyond it are not supported or called for by the facts of the cases, and *Bilbie v. Lumley*, 2 East, is, I think, a decision to that effect. (See also per *Buller*, J. *Malcolm v. Fullarton*, 2 T. R. 648; *Skyring v. Greenwood*, 4 B. & Cres. 281.)

If from mistakes or ignorance, or even misconception of facts, a debtor to a bankrupt pays his assignees without de-

ducting money due to him from the bankrupt, to which no one but himself has any claim in conscience, he may recover it from them as money had and received to his use. (*Bize v. Dickason and another, assignees &c.* 1 T. R. 285, discussed by Mansfield C. J., and Gibbs J., in *Brisbane v. Dacres*, 5 Taunt. 154, and per Cur. in *Stevens v. Lynch*, 12 East, 39.) Again, if a party is induced to acquiesce in a payment to another in ignorance of his own real situation and right to the money, such mistake in fact will enable him to recover it from the person originally liable. Land was settled on a woman during widowhood. She married again, but received the rent for some years, till the remainder-man, being informed of her marriage, claimed the rent, and with her acquiescence received it for five years. She was not then aware, that at the time of her second marriage, the man she married had another wife living. At her death, the tenant was obliged to pay over again to her executor the rent he had paid to the remainder-man; for her acquiescence was grounded on mistake, in fact, of her own situation, and her false opinion that she was a wife at the time. *Williams v. Bartholomew*, 1 Bos. & Pull. 326. (N. B. The remainder-man did not appear to have been aware that the widow's second marriage was void.)

In one case *Buller, J.*, is reported to have said that the only payment by which a party is bound, is that which is made into Court under a rule: to this, it seems, might now be added a payment under the plea provided by the new rules, or under a judgment and execution. *Buller, J.*, describes the above as a payment on record, which can never be recovered back, though made wrongfully; and so differing from payments between party and party, which if made by mistake (at least of fact) do not bind them. (*Malcolm v. Fullarton*, 2 T. R. 648.)

A man may bind himself to take notice of a fact at his peril, so as not to be excused by ignorance of it: *e. g.* if he covenants to repair houses as often as need shall require, he will be liable for not doing so, whether he knows them to want repair or not. (*Doct. and Stud.* 256. See 7 Taunton, 411, *Holt's C. N. P.* 543.)

A well known instance, in which ignorance of fact protects a party who purchases *bonâ fide*, is that of a sale made wholly

and originally in a market place within market hours, or in open shop in London on any day except Sunday, if the articles sold are such as the shopkeeper professes to deal in. In these transactions the property in the goods passes to the purchaser, even against the rightful owner, who may have been robbed or defrauded of them. (See 2 *Bla. C.* 449; 5 *Rep.* 83; 12 *Modern*, 521; *Lyons v. De Pass*, 11 *Adol. & Ell.* 326, *S. C.* 3 *P. & D.* 177; *Peer v. Humphrey*, 2 *Adol. & Ell.* 495.) This rule is paramount except in the case of the sovereign, or of fraud in the buyer, *e. g.* his knowledge that the seller has no right to the goods. (1 *Bla. C.* 449; *Doct. and Stud.* p. 250, *Dial.* ii. ch. 47.) Ignorance of fact will not excuse a sheriff or other officer of the law for seizing the goods of one person by mistake for those of another; for he is to execute process at his peril. (*Doct. and Stud.* ubi supra; *Saunderson v. Baker*, 2 *Wils.* 309; 2 *W. Bla.* 832; *Ackworth v. Kemp*, 1 *Douglas*, 40.)

If at the time of applying to a court of justice for its order, the suitor is ignorant of circumstances material to the subject matter of his motion, he may in some cases be admitted to open the proceedings afresh. Thus where a rule for a criminal information was discharged on affidavits, all of which turned out to be false by the subsequent admission of the deponent, the Court revived the rule. (*Rex v. Eve*, 5 *Adol. & Ellis*, 780.) But if a party has proper materials at the time of his first application, and is not in a state of ignorance, nothing could be more dangerous than his making a fresh application merely because he did not bring them forward at first. (*Bodfield v. Padmore*, 5 *Ad. & Ell.* 785, note.)

Ignorance of *fact* in criminal cases is most important: for if a man, intending to do a lawful act, does from ignorance or mistake, not of law, but of fact, that which is unlawful, there is not that conjunction of the will with the deed, which will subject him to the penal consequences of a criminal act. Thus where a man, on a night alarm of thieves breaking into his house, armed himself, intending to kill the thieves there, and by mistake and in ignorance killed a woman who was skulking there in the dark, having come in without his knowledge to help his servant, and uttered not a word, this was held no felony, though it seemed at least homicide by misad-

venture; (*Levett's case, Croke Charles*, 538, cited 4 *Bla. C.* 27; 1 *Hale, P. C.* 42, 474); for he had reasonable grounds for believing that the person killed in his house had a felonious design against him. (See *East's P. C.* chap. v. sect. 46; 1 *Hawk.* ch. 28.)

Baker, in his Chronicle of A.D. 1471, relates that Sir William Hawkesworth, being weary of life, and willing to be rid of it by the hand of another, blamed his park-keeper for suffering his deer to be destroyed, ordering him to shoot the next man he met in his park who would neither stand nor speak. Sir William afterwards came himself in the night into the park, and was met by the keeper, who, as he would not stand or answer, shot him. This, says Hale (1 *P. C.* 40, cited *East's P. C.* ch. v. s. 46), was holden excusable homicide by the stat. *De malefactoribus in parcis*, 21 Ed. I. (repealed by 7 & 8 G. 4, c. 27), because the keeper was in no fault. The case of a sentry, who kills his officer coming on him at night in the posture of an enemy to try his vigilance, is similar. (*Ibid.*)

Deer having broken into a man's standing corn, he went there at night to watch with his servant, who was armed with a gun; and charged him to fire when he heard any thing rush into the corn. He afterwards rushed into the corn in another part of the field, and was fired on by his servant and killed. Hale held, that, as the servant was misguided by his master's own direction, and was ignorant it was anything but a deer, the killing was by misadventure only; whereas, otherwise it would have been manslaughter, on account of the want of due, that is, ordinary, caution in shooting "upon such a token as might befall a man or a deer," before he could discover whether his mark was one or the other. (1 *Hale, P. C.* 40, 476; *Foster*, 258.) Sir Edward East doubts whether, if the ignorance of the servant was not complete, and circumstances showed him guilty of want of caution, the command of his master could supply an excuse for his act (*Pleas of the Crown*, ch. v. s. 40, vol. i. 266);—particularly if that act was unlawful, or *malum in se*, viz. in its original nature wrong, which would make it murder, if the intent were felonious, or manslaughter, if it went no further than to commit a bare trespass. (*Foster*, 258.)

Foster admits that Lord Coke seems to think otherwise. (3 *Inst.* 56.) Coke's first instance, however, contemplates a *felonious* intent, where he says, that if A., meaning to steal a deer in the park of B., shoots at the deer, and by glance of the arrow kills a boy hidden in a bush, this is murder, though A. had no intent to hurt him, and knew not he was there; for the act was unlawful, as larceny might always be committed of deer so inclosed in a park that they might be taken at pleasure. (1 *Hawk. P. C.* 94; 1 *Hale, P. C.* 411.) Whereas if B., the owner of the deer, had without ill intent killed the boy by a like glance of his arrow, this would have been homicide by misadventure, and no felony. So if one shoot at a wild fowl on a tree, and the arrow kill any reasonable creature afar off without evil intent in him: for it was not unlawful to shoot at the wild fowl, but if he had shot or thrown a stone at a tame fowl of another man in order to kill it, and the arrow or stone by mischance killed a person to whom he intended no harm, this would be murder, for his act was unlawful. (3 *Inst.* 56; 1 *Hale*, 475.)—(This appears to presume an intent to steal the fowl.)

But the instance of Lord Coke's contrary opinion, alluded to by Foster, seems this:—Throwing a stone over a wall, knowing people to be passing on the other side, though only with intent to scare or give them a light hurt, and killing one, is murder; for the intent was evil, though not extending to death, and though he knew not the party slain. (3 *Inst.* 57.) Foster thought this only manslaughter.

If the act from which death results is only *malum prohibitum*, *e. g.* shooting at game by a person not qualified by statute (while it remained in force, or perhaps, at this day, not certificated) to keep or use a gun for that purpose, his case would fall under the same rule as that of a qualified man, so as to make the death chance medley or misadventure only; for the statutes, prohibiting the destruction of game under certain penalties only, do not in such a question enhance the accident beyond its intrinsic moment. (*Foster*, 259; 1 *Hale*, 475.)

The voluntary ignorance of drunkenness will not excuse a crime, though the involuntary ignorance of a child of tender years or a lunatic will. (*Reniger v. Fogossa, Plowden*, 19.)



No debt arises from admitting an account to be correct, as stated, if mistakes really exist in it to the prejudice of the party to be charged. (*Thomas, administrator, v. Hawkes and another*, 8 M. & Wel. 140; see *Viner's Abr.* tit. Mis-casting.)

A party in occupation of premises, who has paid rent to another, is not concluded from disputing his title to it, if he has not let him into possession, and can show the rent paid by mistake of fact. (*Doe d. Higginbotham v. Barton*, 11 Ad. & Ell. 312.)

If a bill accepted payable at a banker's, is paid there, in ignorance that the acceptance is forged, it will be too late to call on the parties who received the amount to refund after the day on which the money was paid. (*Cocks v. Masterman and others*, 9 B. & Cr. 902; *Williams v. Johnson*, 3 Bar. & Cress. 428.)

We will now advert more particularly to the maxim "*Ignorantia juris non excusat.*" Ignorance of law, or error respecting it, is no such excuse as will avert the legal consequences of either; "for no subject of the realm can be presumed misconusant of the law by which he is governed." (*Plowden*, 342, 184.) This maxim is mainly in regard of the public, that ignorance cannot be pleaded in excuse for crimes (per Lord Chancellor *King* in *Lansdown v. Lansdown*, *Moseley's R.* 364). "Ignorance of the law (though invincible) doth not excuse as to the law but in few cases, for every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law." (*Doct. and Stud.*, 16th edition, p. 250, Dialog. II. chap. xlvi.) Hale thus illustrates this maxim:—"Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted on offenders, does not excuse any who are of the age of discretion and compotes mentis from the breach of it, because every such person is bound to know the law, and presumed so to do." (1 *Hale's P. C.* 42.)

The reason for the maxim is that of necessity. It prevails, "not that all men know the law, but because it is an excuse which every man will make, and no man can tell how to confute him." *Selden* (as quoted in the 2nd edition of *Starkie on Slander*, Prelim. Disc., p. cxi., note; and see per *Holt, C. J.*,



in *Philips v. Bury*, 2 T. R. 358, note; and per *Ellenborough*, C. J., in 2 *East*, 472, *Bilbie v. Lumley*.)

Blackstone says, a mistake in point of law, which every person of discretion, not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris non excusat*, is as well the maxim of our own law as it was of the Roman. (4 *Comm.* 27.) But it seems that persons under the age of twelve, having discretion and knowing good from evil, shall not have corporal punishment under a penal statute, except in the case of the old maxim of the law for eschewing murders and felonies, that if an infant do either at such years as he has discretion to know the law, he shall be punished as if of full age, (for *malitia supplet ætatem*, 4 *Bla. C.* 23). He may, however, it seems, forfeit his goods under a penal statute; but these cases run not on the ground of ignorance, but on that of punishing or not punishing persons who, though not ignorant, are of tender age. (*Doct. and Stud.*, chap. xlv. The rule *malitia supplet ætatem* is here amplified by *St. German*.)

The operation of the principle, that ignorance of law shall not avail, is also carried out in civil cases, even where an obscure local act has been overlooked, if the legislature has declared it a public act; for that clause, though merely for the purpose of simplifying proof of it, makes it part of the general law of the land, which all are bound to take notice of. (*Parker v. Elding*, 1 *East*, 352; recognized in *West v. Turner*, 6 *Ad. & Ell.* 614; see *Woodward v. Cotton*, 4 *Tyr.* 689; 1 *Cr. M. & R.* 478; *Beaumont v. Mountain*, 10 *Bing.* 404.)

In the well known case of *Bilbie v. Lumley*, 2 *East*, 469, an underwriter sued an insured to recover a loss paid by him on a ship policy. A material letter, not communicated to the insurer at the time of effecting the policy, was shown him before the adjustment;—so that, though not apprised of the law that the concealment of the letter vitiated the policy, he had full knowledge of the facts on which that law arose. The Court held, that the underwriter could not recover, and declared the principle to be now well established:—"That if a party voluntarily and with full knowledge (or means of knowledge) of all the facts of a case pays the money, he cannot recover it back on account of having made the pay-

ment in ignorance of the law applicable to the facts," (and see 6 *B. & Cr.* 677, per *Bayley, J.*) The Court enforced the bill against him on that subsequent promise, it having been made long after the dishonour, and with knowledge of all the *facts*, saying that the defendant could not defend himself on the ground of ignorance of the law when he made the promise. (*Stevens v. Lynch*, 12 *East*, 38; see *Gomery v. Bond*, 3 *M. & Sel.* 378.)

Again, a purchaser of land or goods will not be protected by his ignorance of a better title to them in some one who was not party to the sale. (*Doct. and Stud.*, Dial. ii. chap. xlviii.)

Notice in the London Gazette of the blockade of a foreign port by the Queen's fleet is complete *primâ facie* notice of that fact to all her subjects. But as in insurance law such a presumption might be contrary to fact and work injustice, the possibility, or even probability of actual knowledge of the fact, is not considered legal proof of such knowledge; and it is a question of fact for the decision of a jury, whether the captain of an insured vessel, taken by a blockading squadron, on approaching the ports under blockade, actually knew of it before sailing from the friendly port.—*Harratt v. Wise*, 9 *B. & Cress.* 712.

Coke says, "*Ignorantia lectionis et linguæ*" (viz. not knowing how to read a deed or not understanding the language in which it is written) may excuse the intended obligor from executing and delivering it: but ignorance of its sense and operation in point of law will not. (2 *Rep.* 3 *b.*)

But in cases brought before Courts of Equity, when dealing with matters exclusively belonging to that jurisdiction, relief is afforded against ignorance of the law.

Of four brothers the second died; the eldest entered his lands, and the youngest claimed them. They applied to a neighbouring schoolmaster for his opinion, which he gave in favour of the youngest, on the ground that lands could not ascend. The eldest thereupon agreed to divide the land in dispute with the youngest, declaring he had rather do so than go to law, though he had the right; and executed a release of the moiety to the youngest, and a bond in a penalty for his

quiet enjoyment of it. The youngest afterwards died, leaving an infant son, on whom the moiety descended. Lord Chancellor King decreed that the bond and conveyance should be delivered up to the eldest brother, as having been obtained by mistake and misrepresentation; declaring that deeds so executed could not be sustained in a court of equity. (*Lansdown v. Lansdown*, *Moseley's Rep.* 364. See this case commented on by *Leach*, arguendo, 2 *Meriv. R.* 233, 328.)

In *Bingham v. Bingham*, 1 *Vesey*, 126, the plaintiff was entitled to an estate, and was fully apprised of the instrument which created his title to it. He had an opportunity of considering the effect of the instrument, and of taking legal advice on it; yet under a mistake of his rights, arising from a gross ignorance of the law, bought the estate from the defendant, who had no claim to it: yet the court of equity decreed for the plaintiff with costs.

In *Turner v. Turner*, 2 *Chanc. Rep.* 81, there was a mutual mistake of parties as to title, and the court of equity relieved.

In *Pusey v. Desbouverie*, 3 *P. W.* 321, a daughter released her rights to her orphanage share by the custom of London. She was at the time ignorant of her right under the custom and of its value, though told she might have her orphanage share. No fraud appeared; but the court of equity would not suffer the heir to take advantage of her ignorance, whether of law or fact. (And see arguendo by *Leach* and *Bell*, in *Cholmondeley v. Clinton*, 2 *Meriv.* 237, 274.)

However, the mere circumstance that the principles of a court of justice are in the main those of equity, will not enable it to dispense with the positive enactments of a statute, though every party to a particular transaction, thereby rendered illegal, may have been ignorant of its character and consequences. (*Ex parte Brine*, in *re Budgett*, 1 *Buck's Bankruptcy Cases*, 19, 109, on 5 *Geo. 2*, c. 30, s. 24, the case of a petitioning creditor receiving his debt in full.)

The rule has always been that if a man has actually paid that which in equity and conscience he ought to discharge, though not compellable by law to do so, *e. g.* a debt barred by the statute of limitations or contracted in infancy, he shall

not recover it again. (See per *De Grey*, C. J., in *Farmer v. Arundel*, 2 *Bla. Rep.* 825.)

But where money is paid under a mistake (not adding of law or fact, see 5 *Taunt.* 154, per *Gibbs*, J.), which there was no ground to claim in conscience, it may. (See per Lord *Mansfield*, *Bize v. Dickason*, 1 *T. R.* 286; treated as a single case by Sir James Mansfield, 5 *Taunt.* 162.)

Where without fraud or any mistake in matter of fact, or ignorance of fact, money has been paid, it cannot be recovered back; for ignorantia legis non excusat. (See per *Buller*, J., in *Lowry v. Bourdieu*, *Doug.* 471; as relied on per *Gibbs*, J., in *Brisbane v. Dacres*, 5 *Taunt.* 153.) But this application of the maxim, by *Buller*, J., is impugned by *Chambre*, J., who puts the case of *Lowry v. Bourdieu* on the ground that the transaction being illegal, (*e.g.* insuring a ship without having interest in her), the maxim applied “in pari delicto potior est conditio defendentis;” accordingly after the ship had arrived safe, the insured failed to recover the premium paid. (*Brisbane v. Dacres*, 5 *Taunt.* 158. See also by Lord *Mansfield Doug.* 471.)

However, if an officer of the law receives a larger fee than he is entitled to by statute, in ignorance of the law, and acting on long usage in a particular county, the surplus is recoverable; for the positive enactment must prevail. (*Dew v. Parsons*, 2 *B. & Ald.* 562.)

Even a court of law has relieved against a cancellation of a deed, which took place under a mistaken opinion that its objects were answered by a will of subsequent date. They held that the deed was cancelled either by mistake of fact as to having made a provision by will for raising money which had not been so made, or of law as to the effect of the will as it stood in reality, and that in either point of view the deed should be enforced. (*Perrott v. Perrott*, 14 *East*, 423; *Onyons v. Tyrer*, 1 *P. Wms.* 345; 2 *Vern.* 742; *Prec. Ch.* 459; *Burtenshaw v. Gilbert*, *Cowper*, 52; *Hyde v. Hyde*, 1 *Abr. Eq.* 409.)

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**ART. VII.—*Considerations on Reform in Chancery.* By Edmund Robert Daniell, F.R.S. Barrister at Law.**

THE present state of the Court of Chancery, and the reforms in progress, are of so much importance, and attract so large a share of public attention, that we are unwilling to publish this number without noticing some events connected with the Court, which have occurred within the last quarter.

Lord Lyndhurst has for the third time taken his seat as Lord Chancellor; and Mr. Knight Bruce and Mr. Wigram have commenced their duties as Vice Chancellors. The extensive experience of the two new judges, while they practised as counsel at the equity bar, and the high reputation which they established, have given rise to a general expectation that their Courts will give new life to the transaction of the public business. We may add that the diligence and patience which they have uniformly displayed in the discharge of their duties, give an assurance that this expectation will be realized.

With respect to these Courts, two steps have been taken, which appear to us to be erroneous. In the first place, the causes of the old lists were dealt out, thirty by thirty, into the new Courts. The consequence was that causes which previously stood low on the list were advanced to immediate hearing; and then ensued all those inconveniences which arise from a hasty preparation of the necessary papers. It seems to us that the causes should have been dealt one by one, like cards out of a pack, into the different Courts successively. The consequence would have been that those causes which were high on the list, would have been the first brought on for hearing, and no barrister or solicitor of ordinary diligence would have been taken by surprise.

The other false step was founded upon a principle, which prevails equally in all the different branches of the Court of Chancery: we mean the permission given to the plaintiff to choose his own Court. The first injurious effect of this principle is, to bring into the Court, in which the greatest proportion of the ablest counsel are practising, an undue proportion of the business. The principle is one, which is very convenient to those particular counsel. It is also convenient to

agents in extensive practice, as it enables them to collect all their own causes into one Court, and to watch them there with a facility and economy, which could not be obtained if the causes were scattered in different Courts. It is also convenient to suitors, who wish to support a very doubtful claim. But it is very inconvenient to the public, as it leads to the idleness of one Court, while another is overstocked and pressed for time.

There is another evil, still more serious. The differences which prevail between counsel, in point of ability to persuade the Court, are matters of daily observation. Some one counsel is often far more successful than any of his competitors. A suitor upon such a claim as we have mentioned, is quite ready to bring it forward, if he has the power of doing so under the auspices of the most able of the counsel; but rather than contend against this counsel, he will often give up his claim as hopeless. The first step, then, which he takes is to ascertain whether he can deliver his retainer: if he can, he opens his battery in the Court, where the counsel is paramount; if he cannot, he has recourse to the ruling genius of some other Court. This practice is sometimes defended upon the ground, that it prevails in the Courts of Law. The position is only true of one, and not wholly true of that one. Suppose a suitor to commence his action in the Court of Common Pleas; any point of law, which it involves, may be argued by Sir Thomas Wilde before the judges of that Court. But, except in a town cause, it is quite a lottery, before what judge the action may be tried. The leading counsel at the trial may or may not be a member of the coif; if he is, he may or may not be a person of high reputation. The analogy then is not correct. But even if it were, the more important question would still remain, whether the principle is good or bad. Why is the plaintiff, rather than the defendant, to choose the judge, who shall decide between them? Still more, why is he to choose not merely the judge, but the judge in company with the counsel, to whose influence he is most likely to yield? To a certain extent he cannot be prevented from gaining an advantage in selection of counsel, as he is the person who originates the proceeding, and his battery may be masked, until he has selected his

garrison. He may also, if he can afford the expense, retain the ablest counsel in every one of the Courts, and thus be fortified with a certain amount of advantage, into whatever Court his cause may be allotted. But our question is, why the rules of the Court are to be so framed, as to invite him to gain advantage by selection? Truth is the object. Why then shall the practice be of such a nature, as may enable one party to secure the balance not merely of abilities, but of known influence over the Court on his particular side? The practice has been sometimes supported on the ground, that a party, who takes the opinion of a counsel in consultation, ought to be certain of securing his services in the conduct of the cause. We may observe in answer, that our present practice secures this benefit to the plaintiff only, but not to the defendant: and moreover that the non-appearance of the counsel will not be any real obstacle to the attainment of justice. If the cause happens to come into the Court, where he practises, he will of course appear upon the original retainer. Thus the real evil will be prevented, that is, he will not be able, having learnt the secrets of one party, afterwards to plead the cause of the other.

We may add that the effect of the present practice has been signally bad upon the present occasion. Plaintiffs were told that they might choose their Courts. In great numbers they chose the Court of the Vice Chancellor of England. Soon afterwards an order was issued that a certain number of the causes set down in the list of that Court, should be transferred to the Court of the Vice Chancellor Knight Bruce. Thus the money paid for retainers was thrown away; the expectation of the services of the particular counsel was disappointed; and, as we venture to suggest, the rule was proved to be open to a new and very serious objection.

It is impossible to close our remarks upon the establishment of the two new Courts of Chancery without expressing the regret, which we feel in common with all the members of the Chancery bar, at the death of the late Mr. Jacob. He was a man who had accumulated a vast extent of knowledge, and he had the power of recalling at a moment's notice any portion of his learning, which happened to be required for immediate use. Few men have possessed the faculty of



arguing more strongly or more acutely. He appeared to have peculiar pleasure in the thorough investigation of legal doctrines; and by the careful consideration of common and statute law, of judicial decisions and of general reasoning, he was continually aiming at the discovery and establishment of clear and definite legal principles. Few lawyers met him in consultation without gaining instruction, or watched him in the conduct of a cause, without admiring the fertility of his mind in suggesting new and unexpected points of argument. We may add that the moral qualities of Mr. Jacob, no less than his intellectual ability, commanded admiration. He was of all men the most scrupulous and conscientious in the discharge of his duty to his client. No prospect of emolument ever induced him to undertake business which he would not be able to transact in his own person, nor would the inconvenience of length of time induce him to forego a discussion, which he believed to be advantageous to his cause. By his amenity of disposition, his uniform good humour, his careful abstinence from irritating and angry remark, his readiness to impart assistance and advice, and his universal courtesy to all with whom he came in contact, he established amongst the profession such feelings of respect and friendship, as created universal regret on his retirement, and the deepest sorrow at his melancholy end. He was the person, whose early promotion to the bench in one of the Courts of Equity has long been desired, not merely by counsel practising in Court, but also by the leading conveyancers. He was regarded as of all men the most capable of securing the doctrines of the law of real property upon a distinct and satisfactory basis. He was possessed of a peculiarly judicial mind, able to weigh arguments one against another, and by the strength of his memory, and the clearness of his intellect, to survey all the circumstances of a complicated case, spread forth, as in a map, before him. But it has pleased Providence to close his career at the moment, when he was approaching the threshold of that office, for which he had exhibited peculiar fitness. Lawyers will mourn over one, whom they would have addressed with confidence and respect; and the country has reason to lament a man of vast attainment and strict integrity, who, had his



life been spared, would have rendered great public services in a responsible and exalted station.

We pass to some topics which form the subject of the "Considerations" placed at the head of this article.

A few days before the Orders of August, 1841, were to come into operation, an order was issued, directing that for the present the five first of them should be suspended; Mr. Daniell says that the remainder of those orders "are far from giving satisfaction to those who are conversant with the practice of the Court."

We do not intend to discuss these Orders at length.<sup>1</sup> Cases will of course arise, in which the construction of them will come into question. We think that in the meantime a detailed examination of them would be very unprofitable. We must, however, observe that the general principle upon which they are framed, distinguishes them from preceding orders, with which Mr. Daniell finds fault. Mr. Daniell says "that nearly the whole of them have been framed more with a view to the convenience of the persons professionally engaged in conducting the suits, than for the benefit of the actual suitor."<sup>2</sup> In our last number<sup>3</sup> we took the liberty of warning our professional readers, that the new Orders would greatly increase the necessity for their personal exertion. For instance, the new machinery for the interrogatories will be very troublesome to counsel and solicitors; but it will shorten the record, relieve the judge from a mass of writing, of which it was necessary to examine every word, and in diminution of expense and of time will be of essential advantage to suitors. It has been said that some of our draftsmen have expressed a strong objection to this increase of their labour. We, however, feel certain that, although such an idea may have occurred to one or two individuals, still the vast majority of draftsmen will feel it a point of honour and duty to secure to their clients all the anticipated benefits, even at a very large sacrifice of personal ease. Lord Cottenham's object evidently was, so to frame his alterations as to make their success depend in the main upon the exertions of counsel. It will, we are certain,

<sup>1</sup> Some valuable remarks are appended to Mr. J. Sidney Smith's edition of them.—*Edit.*

<sup>2</sup> Page 14.

<sup>3</sup> Page 265.

be found in the end that his confidence was placed in the proper quarter.

The new Orders, issuing as they did on the eve of a change of government, came into the world under unfavourable auspices. Orders of this nature require for their successful operation the favour and fostering care of the Court in their interpretation. The Chancellor, with whom they originated, was sure to regard them with some measure of parental tenderness, and to treat his offspring with extraordinary care, if such were found to be in any instance necessary. We all know with what fondness authors and artists regard their own productions. "The same characteristic (says Aristotle in his *Ethics*) has prevailed amongst artificers. The love, which they feel for their works, far exceeds the love, which their works, if endowed with life, would feel for them. Poets supply the strongest example; for they are overfond of their own productions, and love them as if they were their children."

But without attributing to Lord Cottenham any excessive attachment to the new Orders, we may, at any rate, be certain that, had he continued in office, he would have brought them into action with vigour and activity. He would have carried them out; and would have added, in the same spirit in which they were conceived, any further orders which might be found requisite. The public will be anxious to see that the converse of the rule of Aristotle is not correct in the instance before us; and that, when any of these orders are submitted to the present Chancellor, they do not, as the works of his predecessor, receive a step-parent's welcome. We feel confident that they will be treated with as much favour and liberality of construction, as if they had emanated from himself: that difficulties unnecessarily raised will find no encouragement; that where the letter may be in any respect defective, the spirit of the whole will be observed and maintained, and that the suitor's interest will not be allowed to suffer from technical objections.

We think that Mr. Daniell's pamphlet is full of important matter. For the bold and unhesitating but at the same time very courteous tone, in which he comments upon the conduct of all classes of the profession, he deserves universal thanks and approbation. We quite agree with him, that the interests of the suitor were not sufficiently consulted in the orders which were issued after the commission of 1825, and "that

the labours of that commission and of those who penned the orders consequent upon its recommendations, if they have not produced an actual increase of the evil of delay, have," as he himself says, "effected<sup>1</sup> no positive relief to the suitor." But this conviction on his part makes us rather astonished that he is so eager to obtain another commission formed upon the same principle, rather than a commission more limited in number, such as that which Lord Lyndhurst has recently appointed. The members of the new commission appear to us perfectly unexceptionable—two very able equity judges, and two equity counsel of the first eminence. We cannot understand why such a body is to be regarded as "an irresponsible committee,"<sup>2</sup> or why "its members are inaccessible to the suggestions and representations of those who, if the committee had been of a more public nature, might have been willing as well as competent to assist them." Suggestions for improvement in practice are offered, not for personal notoriety, but for public good. Why may they not be offered to a small, as well as to a numerous body of commissioners? Who are the persons who will be less ready to give assistance, because the body is small in number? The meaning of such remarks is not very intelligible to us. The commission of 1825 was a numerous commission, and, as Mr. Daniell himself asserts, a failure. Lord Lyndhurst has now determined to try a commission of another character. Surely he acts with wisdom in making the experiment. It seems to us to have been suggested by the recollection of former failures, and to have this guarantee for improvement in the result, that the members of the new commission, in proportion as their number is small, will bear a greater amount of individual responsibility.

In many of the opinions expressed by Mr. Daniell we are able to concur entirely. It is well that the public should be warned that to expect such expedition in equity proceedings as may be obtained in proceedings at law, is perfectly inconsistent with the nature of the matters at issue. "Upon full investigation of the subject, it would be found," says Lord Redesdale in the passage quoted<sup>3</sup> by Mr. Daniell, "that this expedition (i.e. in proceedings at law) has been obtained by

<sup>1</sup> Page 21.<sup>2</sup> Page 2.<sup>3</sup> Page 9.

means of Courts of Equity, by retaining the simple forms of great antiquity adopted in Courts of Common Law, and throwing the burthen of more complicated cases requiring different forms of proceeding on the Courts of Equity." Much may be effected by judicious reform in Courts of Equity; but there is no advantage in holding out expectations which cannot be realized, nor in making attempts at alteration which are inconsistent with the real object and character of the proceedings. Mr. Daniell quotes from the same learned author another hint, which will not be thrown away upon our readers. "Reformers are too apt to look to one grievance, and propose a remedy which would produce a thousand." The apophthegm cannot be more significantly illustrated than in the history of a new order in Chancery, if it happens to unsettle the old established practice, and to give rise to a series of new decisions.

The first suggestion of Mr. Daniell is, that generally speaking answers ought to be put in more speedily than after the periods at present fixed of eight or ten weeks. He also recommends abbreviations of time in many of the subsequent stages in the suit.

Mr. Daniell also enters upon the question of costs. One part of the reform now undertaken is to shorten all parts of the record. There ought to be a corresponding alteration in the mode of fixing the remuneration of lawyers. To them the length of pleadings produces no labour equivalent to the increase of pay. The formal parts of the record give no trouble at all, but they produce an increase of remuneration, which compensates them for the inadequacy of the fees in the laborious and difficult parts of the case. If, then, the pleadings are shortened, there ought to be some change in the mode of fixing the remuneration; or else a lawyer will be left to struggle with the difficult parts of the case at a small fee, and will be deprived of the lighter parts of the case where he has hitherto found a compensation. Our notion is, that the formal parts of the case should be as much as possible reduced, and that the substantial matter should be expressed with the utmost brevity, and be accompanied with a high remuneration. Cheap law is worth the price at which it is purchased, and no more.

The suggestion that there should be no difference between costs as between party and party, and costs as between solicitor and client, is one in which we entirely concur. It is a very simple principle that the person, who renders legal expenses necessary, should pay for them; nor can we see any reason that there should be any limitation to the amount borne, except that the work paid for has really been requisite. It is possible that many of the charges, which are included by one class of costs and excluded by the other, may appear to have been attended with little advantage in the proceedings. Still the simple question recurs, whether those charges do or do not arise out of the litigation; and, if they were reasonably undertaken for either attack or defence, they ought to borne by the party, who is responsible for the general costs. We shall rejoice, if an attempt is made to relieve the Court of Chancery from the keen satire of Dean Swift, "in which<sup>1</sup> Gulliver informed the King of Brobdignag of his father having been ruined by a suit in chancery, in which, after twenty years' litigation, he had obtained a decree in his favour *with costs*."

The remaining remarks of Mr. Daniell are directed principally to the reform of the Masters' offices, and to the proposed abolition of the Six Clerks. As to the former subject our readers will find a discussion at some length upon the propriety of counsel being more frequently employed before the Masters, and of the Masters' Courts being opened to the public. We have but little room for entering upon these topics; but we must express our conviction, that, let these offices be ever so freely open to the public, there will still be no public inclined to frequent them. It often happens that during the discussion of most important cases, the Court of Chancery is empty, while in the Court of Law there is scarcely room for standing. The reason is obvious, that it is very dull to hear an argument upon a point of law, and often very amusing to hear the examination of witnesses. If then the Court of Chancery is dull, how much more dull is the office of the Master! If counsel cannot draw full houses, when they appear before Chancellors and Vice Chancellors, what is their chance of an audience, when they are addressing a Master?

<sup>1</sup> Page 26.

To open the Master's office will, we think, do no harm at all; but we should indeed be sanguine, if we anticipated any essential benefit. It appears to us, that the client is himself blameable for a great deal of the delay in the Master's office. Mr. Field<sup>1</sup> appears to think that the solicitor is in fault. We cannot help asking, why clients do not themselves attend a little more to their own business and themselves stimulate their solicitors to increased activity. All persons, who transact the business of others, require watching: judges, counsel, ministers, agents of all descriptions. Ministers are watched in Parliament; judges and counsel in Court. There is no one to watch the solicitor in the Master's office, except the client himself; who, if he is inattentive to his own affairs, has no right to complain, when he pays the penalty of remissness. Every effort ought to be made to diminish the misery of these delays: but let the rules of the Court be ever so stringent, much must always be left to the discretion of the solicitor. In order that such discretion may be properly exercised, the client must take some pains in his own person. *Quis custodes custodiet ipsos?* is a question, to which a satisfactory answer is always indispensable. If in this instance it is not answered by the client taking some personal exertion, those parts of his suit, which are altogether uninteresting to the public, will very often be slowly and imperfectly conducted.

It remains to draw our readers' attention to a statement of the points at issue upon the proposed abolition of the Six Clerks' Office. The five orders of August last, which have been superseded, are intimately connected with this subject. It is not too much to assume that the suspension of them has taken place with a view to allow the whole matter to be settled at once, and the entire plan to be brought into operation, after all the arrangements, which are necessary, have been put into a perfect and harmonious state.

"I shall confine my remarks," says<sup>2</sup> Mr. Daniell, "to those duties, which have been put forward as affording the most substantial ground of complaint against the clerks in court. These, as far as I can collect from the able pamphlet of Mr. Edwin Field, who is the leader of the attack against these officers, are, 1st. That of receiving and transmitting to the

<sup>1</sup> P. 28.

<sup>2</sup> P. 49.

solicitor notices of motions and other applications to the Court and Masters, as well as all writs and orders not requiring personal service; 2dly. The making of office copies of the pleadings filed in Court, and 3rdly. The taxation of costs. For the discharge of the first duty, it has been proposed to substitute the delivery of notices by the solicitors to one another by post. The great objection on the second head is to be found in the expense. As to the third, it is admitted on all hands to be admirably discharged by the present functionaries. The gist of Mr. Daniell's remarks upon this subject is, that considering the great importance of uniformity in the practice of the Court of Chancery, and the large number of practising solicitors, the present office, after all the sinecure parts of it have been pared away, and all unnecessary expenses have been reduced, may be retained with advantage to the suitors. Without entering at large into the question, we beg leave to call attention to one part of it. According to the present practice, bills and answers are filed at the Six Clerks' Office.<sup>1</sup> The bill and the answer first filed are filed together: any other answers that are filed, are filed separately. Depositions taken in town are kept at the office of the Examiner; those taken in the country are kept by the sworn clerk, who has made out the commission.<sup>2</sup> Affidavits are generally kept at the Affidavit Office:<sup>3</sup> but, if made for use in the Master's office, are, with reports and certificates made by a Master or by the Accountant General, kept at the office of the Master of Reports and Entries:<sup>4</sup> rules to produce witnesses to pass publication, and all appearances and consents, are kept by the Registrar.<sup>5</sup> We do not say that the Six Clerks' Office should be preserved; but we are fully convinced that for the convenience of practice, all these documents, of whatsoever kind, ought to be collected together and made accessible in some one office.

We venture, in conclusion, to offer two suggestions for the consideration of those who are engaged in the reform of the Court of Chancery. One is, whether it is not expedient to induce the leading equity draftsmen to choose the Courts in which they shall practice. Hitherto they have attended to two Courts besides that of the Lord Chancellor. With their

<sup>1</sup> Grant's Practice, p. 24.<sup>2</sup> Ibid. p. 240.<sup>3</sup> Ibid. 115, 28.<sup>4</sup> Ibid.<sup>5</sup> Ibid. 26.



utmost exertion they have had difficulty in attending personally to all their different business. The nature of business in Chancery, the motions and petitions and different applications, in addition to the principal arguments in a cause, have sometimes rendered this difficulty almost insurmountable. The increase in the number of the Courts will of course make it still greater. We all know how grievously disappointed suitors are, when their causes are heard in the absence of their counsel. In these instances there is always in appearance, if not in reality, a defect in the discharge of duty on the part of the counsel, and also a want of fairness in the hearing of the cause. In judicial proceedings there ought to be not only the reality, but also the appearance, of justice. We cannot help thinking, that if some step were taken to diminish this evil, it would tend to increase the satisfaction of the suitors, and also the respectability of the profession.

Our second suggestion is, that all the orders of the Court should be reduced into one compilation, the incongruous parts cancelled, all previous orders repealed, and the whole arranged in a simple and intelligible form. We despair of ever seeing our law reduced to a code. It is too extensive, derived from too many different sources, and too much connected with the ancient period of our history, for the accomplishment of a task of this nature. But to the orders of the Court these objections are inapplicable. The codification of these orders would certainly require the exertion of much labour and patience; but it seems to us that the work is practicable, and that, if it could be accomplished, it would have very great effect in rendering clear and simple the course of our proceedings in Chancery.

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## ART. VIII.—LIFE OF LORD REDESDALE.

THE ancestry of this excellent lawyer may be traced further back in the annals of Northumberland than even to Sir John de Mitford, at the time of the conquest. There was an old writing, we are told, produced at Durham, by which one of the Mitfords, in the time of Edward the Confessor, did assure his wife's jointure out of lands in Mitford. From a pedigree furnished by the late lord to the Rev. J. Hodgson, it appears that Sir John de Mitford, knight, a descendant of this warrior, was a person of very considerable note in his time, and frequently returned to parliament as representative of the Commons in the reigns of Edward the Third, Richard the Second, and Henry the Fourth. His name occurs in forty different writs and commissions, empowering him to act in matters of a civil or diplomatic nature between England and Scotland. When Henry the Fourth in 1400 required several prelates, earls, barons, knights, and esquires, from different northern counties, to attend him and his council, on the morrow of the Assumption, the persons summoned for Northumberland were Monsieur Henry de Percy, John Mitford, and four others. Sir John Mitford in 1361 lived in Milk-street, where he is supposed to have had his law chambers. In 1396 Sir John Scrope granted to this knight the keeping of his castle, under the style of Lord of Mitford; and by another instrument, for his good council and advice, gave him 100 shillings a year out of the lands for his life.

Robert Mitford, in the next century, appears to have degenerated from this noble lineage. On December 13, 1598, he was presented at the archdeacon's visitation "for suffering divers persons to eate, drinke and play at cards in time of eavening praier." A modern reader, unacquainted with this gentleman's unimpeachable descent and respectability, might have supposed the charge to be "against the tenor of his licence." Among his numerous posterity was John Mitford, a banker and goldsmith in London, trades first united by persons of affluence

depositing their cash with the London goldsmiths about 1645, when the tyranny of the Long Parliament so entirely confounded all social order, that merchants could no longer trust their clerks, and dared not deposit their money, as they had before done, in the mint. Descended from such a long line of ancestors, John Mitford, the father of the late peer, had been called to the bar, but retired early to the duties and pleasures of a country life, and lived in elegant privacy at Exbury Park, in the county of Hants. By his marriage with Philadelphia, daughter of Willey Reveley, Esq. of Newton, and first cousin to Hugh Duke of Northumberland, he had two sons—William, author of the well known History of Greece, and John, the subject of this memoir.

John Mitford was born in London, in a then fashionable part of the metropolis, the parish of St. Andrew, Holborn, on the 18th August, 1748 (o. s.) He received his education at Winchester School, and New College, Oxford, but left no bright traces of an university career. Academical distinctions were then rarely sought; the members of his aristocratic college deemed themselves fortunate in being admitted to a degree without any preliminary examination, and cared not to awaken echoes of fame in their silent halls. So great was the apathy which prevailed, that William Mitford, the elegant Greek scholar, who commenced his brilliant literary career by writing a work on the theory of languages, quitted Queen's College, Oxford, without taking a degree, and the colonel of his regiment of militia, whom he afterwards succeeded, the illustrious Gibbon, was compelled to rusticate from Magdalen for errors, into which an inquiring mind and utter idleness had betrayed him.

On leaving the university, Mr. Mitford became a clerk in the Six Clerks' Office, by a singular coincidence commencing his chancery practice, in the same officina brevium, as his celebrated competitor for equity renown, Sir Samuel Romilly. Fortunately for the interests of literature, and a younger brother's fame, Mr. William Mitford, the eldest son (he was senior by four or five years), who had been called to the bar, felt too much distaste for the drudgery of the profession to struggle against his private inclinations, especially as his

father's death in 1761 had made him completely independent. He found too exquisite delight, to quote his own elegant lines, in the stillness of his father's seat, and the finely wooded banks of the Font—to linger amid the *opes, strepitusque* of term and Westminster Hall.

“Duc me ubi Fons oriens tortis se erroribus ornat,  
Quâ nectit querulam lugubris unda moram.”

To a brief memoir of his brother Lord Redesdale has added the following curious note:—“It was said by the Lord Chancellor Hardwicke, that scarcely any person amongst his early acquaintance had persevered in the study of the law, who had competent means of support without the profits of the bar, and the author's father and his mother's brother and father, all educated for and called to the bar, having quitted the profession, when they respectively succeeded to moderate paternal estates, he thought himself justified by their example in leaving the bar to his younger brother, whom necessity compelled to persevere.”

Stimulated by this sharp spur, Mr. Mitford entered himself at the Inner Temple, and soon cleared all the obstacles of his profession. The talisman of success in his day was writing a book; even an indifferent work insured some degree of attention to the author, whilst an able treatise was the sure preface to fame and fortune. The path has since been trodden too indiscriminately to offer the same advantages; but this, the scholar's method, may still be commended in preference to most of those now in fashion.

In his treatise on the Court of Chancery, Mr. Mitford has drawn, in an enlarged analytical manner, a rational system of that branch of the practice of the courts, illustrated and supported throughout by references to the authorities of rules, orders and determinations of preceding judges. “His book,” said Lord Eldon, “is a wonderful effort to collect what is to be deduced from authorities, speaking so little what is clear, that the surprise is not at the difficulty of understanding all he said, but that so much can be understood!” The success of this excellent work—still at this long interval of time the best and safest guide through the meanders of chancery prac-

tice—was so complete, that, on a second edition being demanded in a few years by the profession, the author found himself compelled to apologize for its mistakes, by the excuse of pressure of professional business. In company with Mr. Scott, whose steps he assiduously followed, always a pace or two behind, Mr. Mitford obtained the lead in chancery business, acquired the reputation of a thorough draftsman, and was supposed to decide in chambers on more cases of private property than any man at the bar.

It was then the custom for chancery men to go the circuit, and Mr. Mitford selected the western, which he travelled with Jekyll, Dallas and Pitt, but could not boast of a much fuller bag than the future premier. At Pitt's instance an annual dinner took place for some years at Richmond Hill, the guests consisting of Erskine, Redesdale, Grant, Jekyll and Dallas; a pleasant party, till political excitement caused the members to be too widely estranged from each other in opinion, and would not suffer them to meet, except on state occasions, at the same table.

To advance his legal and political interests, Mr. Mitford was in 1788, through the patronage of a relative, the Duke of Northumberland, introduced into Parliament as member for the Duke's close borough of Beeralston. His voice and vote were steadily given to ministers, but, though he spoke on several questions of interest with knowledge and good sense, his oratory does not appear to have been sufficiently distinguished to deserve more than a passing mention. He contended stoutly, in company with a serried corps of lawyers, that the impeachment of Warren Hastings had abated by the dissolution of Parliament. The phalanxes of law and eloquence were opposed to each other in martial array, but, as in the combat of Homer's deities, the cause of wisdom prevailed. On the one side Sir Archibald Macdonald, Sir John Scott, Mitford, Erskine and Hardinge; on the other, names familiar as household words and overwhelming in combination, Pitt, Fox, Sheridan, Burke, Grey, Windham, Dundas and Grenville. The best apology that could be urged for Mitford's side of the question was made by the king, who said, that, when Pitt and Fox took the same view of any

subject and voted together, they were sure to be in the wrong.

Mr. Mitford also supported Warren Hastings in his petition against the violent language of Burke, and said pointedly, that, if the late chief governor was guilty, he wished him to fall by the oppression of his crimes, and not by the weight of his accusers.

The first legislative measure, which Mr. Mitford introduced, was a bill to relieve, upon conditions and under restrictions, persons called *Protesting Catholic Dissenters*, from certain penalties and disabilities, to which papists, or persons professing the popish religion, are by law subject. "It was well known," he said, "there was great severity in the laws then subsisting against persons professing the Roman Catholic religion, but the extent of that severity was not equally known. In a book which was in almost every gentleman's hands, he meant Burn's *Ecclesiastical Law*, no less than seventy pages were occupied with an enumeration of the penal statutes still in force against Roman Catholics, and extracts from most of those statutes were also to be seen in Burn's *Justice*. The present reign was the only one (the short reign of James II. excepted) since the reign of Elizabeth, in which some additional severity against Roman Catholics had not been put upon the statute book, and many of the most severe of those acts were in an especial manner directed against the Roman Catholic clergy. He enumerated a variety of these statutes to show that papist priests were guilty of high treason, and would suffer death for offences in their nature trivial, such as persuading others to be of the Roman Catholic religion."

His humane motion—the feeble glimmering of a glorious dawn—was seconded by Windham, but opposed by Fox,—not in regard to what the bill did, but what it did not, for it by no means went far enough. The Attorney General thought the measure not sufficiently comprehensive, and practically useless, the Roman Catholics at that moment walked the streets of London in as perfect security as any other description of subjects whatsoever, and no person thought of molesting them. Mr. Mitford, however, only meant his relief to apply to that body of respectable Roman Catholics, who had pro-

tested solemnly against all those evil opinions, which the language of the laws imputed to them. There was no real, though seeming, inconsistency in this unrelenting opponent of the Roman Catholic claims originating a partial measure for their relief, as he drew a marked distinction between toleration and encouragement, between immunity in faith and the grant of civil privileges, between protection and power.

Mr. Mitford's high reputation in Chancery, and his consideration in the House of Commons, led him by gentle gradations into offices of trust and emolument. Of the grandeur of one of these appointments a glimpse has lately been revealed to us in the diary of Sir Samuel Romilly:—"The Bishop of Durham appointed Eldon, and afterwards Redesdale, chancellor of Durham. There were not upon an average more than four or five causes in the year, owing to the narrow extent of the Court's jurisdiction; the emolument inconsiderable. Grandeur and homage attend the chancellor. The castle of Durham, the episcopal palace, is given up to him. Invitations to the banquet are sent in his name; he presides. In the midst of bows and compliments, and by numerous attendants, we were conducted through long lighted galleries into a drawing room, where some of the officers of the court and their wives were waiting to receive us, and 'My Lord' and 'Your Honour' ushered in every phrase, that was uttered. So sudden a transition into a great man, and the lord of an old feudal palace, reminded one of Sancho's government of Baratania, and still more of Sly, the drunken cobbler of Shakspeare."

Mr. Mitford was also appointed a judge for three of the counties in South Wales, and made the circuit for a year or so to deliver empty gaols, and dispose of such stray causes as could be caught. These Welch judges had sufficient leisure to be great sticklers for their dignity, of which Edgeworth gives an amusing example: "My grandfather, the Welch judge, travelling over the sands at Beaumaris, as he was going circuit, was overtaken by the night and by the tide: his coach was set fast in a quicksand; the water soon rose into the coach, and his registrar and some other attendants crept out of the windows and mounted on the roof and on the coach-box. The judge let the water rise to his very lips, and with becoming gravity replied to all the earnest entreaties of his

attendants: 'I will follow your counsel if you can quote any precedent for a judge's mounting a coach-box.'"

But for a lawyer of conservative politics, so able, and so connected, higher duties were in reserve. On Sir John Scott's being appointed Attorney General, in 1792, Mr. Mitford, as the next eminent chancery barrister, was selected for the office of Solicitor General; an unfortunate choice in the judgment of many, on account of the numerous state trials, which were then impending, and for the conduct of which chancery lawyers, from their comparative inexperience in points of evidence, and trials at nisi prius, could not be fully competent. When the crown had failed in the first two prosecutions, the third, against Thelwall, was confided to Serjeant Adair, whom practice had better qualified to address a jury, and a strong opinion prevailed amongst the supporters of government, that, if he had led in the first case, the verdict would have been different, but that even the serjeant's great tact and experience could not stem the tide, when oppressed with the weight of two verdicts. We doubt, however, whether any abilities could have brought the guilt of the prisoners within the statute of treason, or misled the common sense of a jury to interpret the words "levy war against the king" in a technical and figurative sense, different from the plain and obvious one. The minds of the crown lawyers, by long habits of artificial reasoning, had been

"Held in the magic chain

Of words and forms and definitions void."

Startled at the intelligence that the Jacobin club, with its 44,000 affiliated popular societies, had for a great length of time really governed France, and uneasy at the proceedings of secret corresponding societies, which aimed, as they thought, at democracy, their subtle intellects became entangled, as it were, in a curiously spun net-work of legal enthymemes, through the intricacies of which they wrought out an elaborate conclusion, a lawyer's sorites—that to establish a convention was to subvert the constitution—that to subvert the constitution was to depose the king—that to depose the king was to attempt his life. "I confess," said the ingenious solicitor, "I should have been astonished to hear this doubted, if, in the present age, I could be astonished at any thing, but it is



the temper of the times to hold out to the world that every thing, which has been revered for ages, is now no longer to be revered, that the reason of man is become more powerful than it was in former times, and upon every subject new lights are to break in on his mind ; he is to be a new creature, no longer to be governed by the wisdom of former times, but to proceed entirely upon the theory of his own conceptions."

Notwithstanding this energetic protest, we cannot refrain from thinking, now that the period of alarm has long past, that the opposition, which then triumphed over his doctrines of constructive treason, was a recurrence to, rather than a departure from, the wisdom of former times ; that the defence of Hardy and Tooke, and the other demagogues, as clearly guilty of sedition as they stopped short of treason, was a victory of sound principle and plain reason, over strained interpretations, and dangerous precedents. Luders, an excellent lawyer, has commented with sarcastic pleasantry on the arguments of the Solicitor-General. " There is a case in common practice, which furnishes a very pointed example of the taking the laws and reformation out of the hands of the crown, by numbers and open force, which has never yet received the imputation of levying war against the king, though answering the description of the criminal law, as established by the cases. It used to be frequently practised within sight of the king's palace to the disturbance of his royal residence. How often have two hundred or three hundred persons been assembled in St. James' Park for the purpose of ducking a pickpocket in the canal, before it was enclosed, which they accomplished in defiance of authority ! What defence could be made to an indictment for high treason, if the case of Dammarée is to stand. The prisoner must rely on the illegal good sense of the jury for his acquittal. How dangerous is it, says Sir Matthew Hale, by construction and analogy to make treason where the letter of the law has not done it. For such a method admits of no limits or bounds, but runs as far, and as wide, as the wit and invention of accusers and the detestation of persons accused will carry men."

When a war, like that of the Sheffield cutlers, was trumped up against the Earl of Strafford, he exclaimed, these are wonderful wars ! If we have no greater wars than such as



four men are able to raise, by the grace of God we shall not sleep very unquietly ! There was more danger certainly in the sittings of the convention, but the clauses of the statute of Edward, on which the ringleaders were indicted, did not in plain and express terms meet their crime, and the law of England would not allow that men should be made traitors by implication. It is well known that, even after the verdicts, the Solicitor-General was fully satisfied of the legal guilt of the prisoners in its whole extent having been completely proved, and much as we may differ from his conclusions, we cannot fail to admire his dexterity of reasoning and acuteness.

One passage in his speech against Horne Tooke, when contrasting his loyalty of tone at one time with his jacobinical aspirations at another, excited much applause. The real character of the man was unveiled after his acquittal, when, on hearing of the mutiny at the Nore, he exclaimed, triumphantly, " The Revolution then is begun, stop it who can."

" Men however frequently profess that which they do not believe. A man may have monarchy on his lips, when his heart is far from it. Lord Lovat, for instance, was perpetually protesting his loyalty, whilst he was engaged for a course of years in a deep scheme to overturn the government, to which he professed and avowed such attachment. The language of the French Assembly in 1791 was noticed by Mr. Paine, Mr. Barlow, and others of their eulogists, whose works were admired by the prisoner at the bar. Several of the members of that assembly spoke with the greatest reverence of the constitution until the time arrived when they thought they could overturn it, and there has been a memorable instance that the greatest of traitors may pretend attachment in the moment of the deepest treason. Members know that the vilest traitor professed his loyalty whilst he was contemplating an act of the meanest treachery, and in the completion of that act cried, ' Hail, master, and kissed him."

The conclusion of the Solicitor-General's speech was effective from its very simplicity.

" And now, gentlemen of the jury, I have nothing more to offer. I have discharged, God knows with much pain, the harsh duty imposed upon me. You will now do yours. If your verdict shall discharge the prisoner, I know you will give it with joy ; if the contrary, yet it must be given. The cup, although it may be bitter, must not pass away from you. I have had a duty to perform be-

yond my strength and my ability, but I have discharged it faithfully and satisfactorily to my conscience."

As Sir John resumed his seat, the tear was seen to roll down his cheek. His sensibility and readiness to shed tears on slight occasions—a weakness to which even the hero of an epic, the pious Æneas, was constantly prone,—called forth from Tooke, towards the close of his trial, a bitter but excellent rebuke. The witty defendant had been making some pretty strong imputations against the Attorney-General's integrity, which the party assailed thought it necessary to repel. He accordingly expatiated at some length on the value of character, and the excellence of his own: "He could endure any thing but an attack on his good name, it was *the little patrimony* he had to leave to his children, and, with God's help, he would leave it unimpaired." Here his voice faltered, and he burst into tears; and to the surprise of every one the Solicitor-General became equally affected, and wept as profusely as his friend. "Do you know," said Tooke, in a loud whisper to a bye-stander, on finding this bit of pathos likely to tell against him, "do you know what Mitford is crying about? He is crying to think of the little patrimony Scott's children are like to get."

Of the sharp gibes, which Erskine ventured on the unlucky Solicitor-General, during these long and vexatious trials, the reader of his life in this magazine is already aware. The Solicitor fell again in 1798, in the character of witness, under his lash, from his want of attending to that precise accuracy, with which evidence is required in Courts of Common Law. Having stated, on the trial of the late Mr. Ferguson, the details of the riot at Maidstone in which O'Connor had attempted to escape, Sir John Mitford proceeded to state from his own recollection, that he saw the defendant *encouraging* that prisoner to make his escape, and incurred in consequence the following grave rebuke from the great leader at nisi prius from this unguarded passage in his evidence. "When the sentence was finished, I observed Mr. Ferguson and some other persons whom I did not know, encouraging Mr. O'Connor to go over the bar." Here we must pause. Mr. Gibbs asked the witness, upon his cross-examination, "Did you hear

him say any thing? Did you see him do any thing? The Solicitor-General proved no one thing, which Mr. Ferguson said or did. I am sure I mean nothing in the least disrespectful to the learned gentleman, but it certainly did not occur to him at the moment, that it is not the office of a witness to pronounce by his own evidence that a man encourages or supports, but he is to depose what he hears him say, or saw him do, from whence the jury are to draw the inference which is fit. I really mean no sort of reflexion. Perhaps it arose from the habits of the Court of Chancery, whose practice is different from ours, and where the depositions are of a very general nature; but suppose the Solicitor were to die, while I am speaking to you, and that though you should be satisfied as to all the rest of the evidence, you wished to have it explained with precision what was intended to be conveyed when it was said ‘Mr. Ferguson was encouraging,’ would you condemn Mr. Ferguson upon that evidence without knowing distinctly what act he had committed?” The meaning of the solicitor’s phrase encouraging was very clear, had he been permitted an opportunity of explanation, but the wary advocate saw his advantage, and left to the indignant witness the sole consolation of reflecting, that he was less acquainted with the rules of common law Courts than his own. The incident is worth noting, as it proves the caution, with which even the most eminent counsel should venture beyond their own proper precincts—how liable to trip the most experienced equity lawyer may find himself in the Queen’s Bench—how much on his guard the oracle of *nisi prius*—*illâ se jactet in aulâ*—should be in Lincoln’s Inn Hall. There indeed Sir J. Mitford was above animadversion; in the routine of practice,—in the knowledge of precedents,—in the full mastery of all the cases bearing in favour of his client, second only to his great colleague Sir J. Scott.

When that consummate lawyer became, in 1799, Chief Justice of the Common Pleas, the Solicitor succeeded of course to the office of Attorney-General, and, as the political horizon had begun to clear, was spared the necessity of instituting political prosecutions contrary to the dictates of his placable and kindly nature. His period of office was short, but he had the good fortune not to be compelled to file a single criminal

information for libel, and, in the solitary state prosecution of any importance which he conducted, the trial of the maniac Hatfield, for shooting at the king—he was complimented both by the judge and the opposing counsel on his humanity. Even in the conduct of harsh measures through the Commons, as the suspension of the Habeas Corpus Act, more stringent provisions in the law of high treason, and other bills of dark look and omen, which the critical nature of the times appeared to render necessary—his wonted good luck accompanied him; the ungracious task being lightened by the overwhelming majorities, which supported Mr. Pitt above every difficulty, and by the languor of despair into which the opposition had fallen. When that mighty minister retired from power in disgust, at the close of 1800, and the affectionate esteem in which the Speaker, Mr. Addington, was held by men of all parties, pointed him out as his fitting successor, the Attorney-General had the rare distinction of being solicited to fill the vacant chair. Considerably more than a century had passed since the election of any lawyer, who had filled the office of Attorney-General. Sir Robert Sawyer and Sir William Williams were the two last examples in the days of Charles II., both of whom Sir John Mitford equalled in ability, no less than he surpassed them in straightforward integrity.

When the letter of resignation from Mr. Addington had been read, Sir John Mitford, having previously relinquished the office of Attorney-General, was elected Speaker with unanimous assent. He declined the mockery of formal excuses and rhetorical self-depreciation, and declared stoutly, “that he would not for a moment suppose that any gentleman should think him unqualified for the situation, to which his noble friend had proposed that he should be elected. By giving up his practice in the law, he had in a pecuniary point of view made sacrifices infinitely greater than any advantages that could arise from the situation to which he was then proposed. He had, indeed, entertained hopes that he should arrive at some other appointment, which the labours of his life and the practice of his profession might be supposed to render him most capable of filling. He had not however yet lost sight of those professional pursuits, which had secured to him a competence.”

This candid confession of his wishes was meant to prepare the House for another resignation in the event of a vacancy in any of the high offices of the law, and ought to have spared the Speaker elect from the sarcasm with which Sheridan taunted him on realizing his hopes. "We have now had sufficient experience of the gentlemen of the law to know, that, though they call this the height of their ambition, yet, if any thing higher should be offered to them, they leave us to lament the loss of their experience and abilities."

Sir John Mitford held the situation of first gentleman of England, from February 11, 1801, till the 9th February, 1802, scarcely more than one session, when the death of Lord Clare brought the Great Seal of Ireland within his grasp. By a singular chance Mr. Horne Tooke took his seat for Old Sarum, within a week after his old antagonist had assumed the chair: the moment of shaking hands must have been trying to the nerves of each, but they were both remarkable for courtesy, and the somewhat stately good humour of the one, and the never failing snuff-box of the other, carried them safely over any unpleasant reminiscences. Though his term of office was far too short to admit of any comparison with his distinguished predecessor, he is allowed to have guided the debates of that humorsome assembly, in a season of considerable difficulty, with temper and discretion. But his merits were told at the time by Sir William Grant, and the authority of the eulogist is too high to require further testimony. The record of what passed is best supplied by the Journals:

"On the 9th February, 1802, Mr. Ley, the clerk at the table, acquainted the House, that he had this morning received a letter from Mr. Speaker, which he read to the House, as follows: 'Palace Yard, 9th February, 1802. Sir,—His Majesty having been graciously pleased to signify his intention of appointing me Chancellor of Ireland, it has become my duty to resign the chair of the House of Commons, which I request you to communicate to the House at their meeting this day. I must entreat you at the same time to express to them in the strongest terms the regret with which I quit the high situation, to which their favour had raised me, and my gratitude for their constant and kind assistance and support in my humble attempts to discharge the arduous duties of that important office. I have the honour to be, &c. J. MITFORD."

In moving the appointment of a new Speaker, Sir William Grant expressed in high terms of eulogy his esteem. "It is impossible not to regret that we should so soon be deprived of the services of one, who in the short time that he has filled the chair, has so amply justified the choice that placed him in it. Indeed with knowledge so various and so profound—with information at once so accurate and so extensive, as he possessed, he could not fail to do credit to that situation, even difficult as his predecessor had made it for any man to appear in it to advantage. It is some consolation, that, if he be lost to our own immediate service, a great and valuable portion of the empire is about to enjoy the benefit of his talents in its first place of judicial magistracy. How he will fill that place can be no doubt with those, who know that in the whole compass of legal science there is nothing which his capacious mind has not embraced, from the minutest rules of forensic practice to the most enlarged principles of general jurisprudence. Fortunately for the country the talents it produces are adequate to the various services which it requires."

Selecting his title from that county and district, in which all his proud recollections of family centred, he took out his patent as Baron of Redesdale. A vicinage formerly so noted for the predatory habits of its population, contrasted strangely enough with the character of the new law lord—a Redesdale-man was formerly synonymous with a robber. Had a legal Chancellor been alone wanting to Ireland, the choice of ministers could not have fallen on one more worthy. In the full maturity of knowledge as a chancery lawyer he had no superior, and scarcely an equal. The Reports of Messrs. Schoales and Lefroy, which give in two most valuable volumes the judgments of four years, attest the supreme excellence of the judge. But for the Chancellor of Ireland, as the most influential member of the Lord Lieutenant's cabinet, there were some elements of success omitted, at a time when Ireland was shaken to its centre with rebellion. He had made himself unpopular with the main body of the Roman Catholics by an unguarded expression of hostility; his manners were too cold and unbending for that over sociable and excitable people, they cared more for his politics than his law, and little regarded how good the one might be if the other might be deemed

*bitter bad*, and neither the governor nor the governed would surrender their prejudices at discretion. His want of sympathy with the fun and frolic of the Irish bar, whose punning, rollicking leaders attended more to plays and jest books than to causes or precedents, was a lesser evil, which the good feeling on both sides soon attempted to remedy, but which must have occasioned at first some unwelcome surprise, and disagreeable sensations. Sir Jonah Barrington has given a lively sketch of one of these rencontres, which, though coloured and exaggerated, bears intrinsic evidence of truth.

“Lord Redesdale was much, though unintentionally, annoyed by Mr. Toler (Lord Norbury) at one of the first public dinners he gave as Lord Chancellor of Ireland to the judges, and king’s counsel. Having heard that the members of the Irish bar (of whom he was then quite ignorant) were considered extremely witty, and being desirous, if possible, to adapt himself to their habits, his lordship had obviously got together some of his best bar remarks (for of wit he was totally guiltless, if not inapprehensive) to repeat to his company, as occasion might offer, and, if he could not be humorous, determined at least to be entertaining. The first of his lordship’s observations after dinner was, the telling us, that he had been a Welsh judge, and had found great difficulty in pronouncing the double consonants, which occur in the Welsh proper names. After much trial, continued his lordship, I found that the difficulty was mastered, by moving the tongue alternately from one dog-tooth to the other. Toler seemed quite delighted with this discovery, and requested to know his lordship’s dentist, as he had lost one of his dog-teeth, and would immediately get another in place of it. This went off flatly enough, no laugh being gained on either side. Lord Redesdale’s next remark was, that, when he was a lad, cock-fighting was the fashion, and that both ladies and gentlemen went full dressed to the cockpits, the ladies being in hoops. ‘I see now, my lord,’ said Toler, it was then that the term cock-a-hoop was invented.’ A general laugh now burst forth, which rather discomposed the learned Chancellor. He sat for a while silent, until skating became a subject of conversation, when his lordship rallied, and, with an air of triumph, said that, in his boyhood, all danger was avoided, for, before they began to skate, they



always put blown bladders under their arms, and so, if the ice happened to break, they were buoyant, and saved. ‘Ay, my lord, that’s what we call *blatheram skate* in Ireland.’ His lordship did not understand the sort of thing at all, and, though extremely courteous, seemed to wish us all at our respective homes. Having failed with Toler, in order to say a civil thing or two, he addressed himself to Mr. Garrat O’Farral, a jolly Irish counsellor, who always carried a parcel of coarse national humour about with him, a broad, squat, ruddy-faced fellow, with a great aquiline nose, and a humorous eye. Independent in mind and property, he generally said whatever came uppermost. ‘Mr. Garrat O’Farral,’ said the Chancellor solemnly, ‘I believe your name and family were very respectable and numerous in County Wicklow: I think I was introduced to several of them during my last tour there.’ ‘Yes, my lord,’ said O’Farral, ‘we were very numerous, but so many of us have been lately hanged for sheep stealing, that the name is getting rather scarce in that county.’ His lordship said no more and (so far as respect for a new Chancellor permitted) we got into our own line of conversation without his assistance. His lordship began by degrees to understand some jokes a few minutes after they were uttered. An occasional smile discovered his enlightenment, and, at the breaking up, I really think his impression was that we were a pleasant, though not a very comprehensible race, possessing at a dinner table much more good fellowship than special pleading, and that he would have a good many of his old notions to get rid of, before he could completely conform to so dissimilar a body, but he was extremely polite. Chief Justice Downes, and a few more of our high, cold, sticklers for decorum, were quite uneasy at this skirmishing.

“I never saw Lord Redesdale more puzzled than at one of Plunkett’s best jeux d’esprits. A cause was argued in Chancery, wherein the plaintiff prayed that the defendant should be restrained from suing him on certain bills of exchange, as they were nothing but kites. ‘Kites, Mr. Plunkett!’ exclaimed Lord Redesdale; ‘kites never could amount to the value of those securities: I do not understand this statement at all, Mr. Plunkett.’—‘It is not to be expected that you should, my lord,’ answered Plunkett. ‘In England and in



Ireland kites are quite different things. In England the wind raises the kites, but in Ireland the kites raise the wind.' 'I do not feel any way better informed yet,' said the matter-of-fact Chancellor. 'Well, my lord, I'll explain the thing without mentioning those birds of fancy,'—and therewith he elucidated the difficulty.

"Lord Redesdale never could pronounce the name of Colclough, a suitor in the Chancery Court. It was extremely amusing to hear how he laboured to get it off his tongue, but in vain. Ealcloff was his nearest effort."

But whatever difficulty the Chancellor might find at first in understanding these men of hard names and singular natures, his courtesy in private, and judicial merits on the bench, soon rendered him a general favourite. His disquietudes originated in another source, and the libels with which he was assailed were darted by a veteran hand of more experience than a counsellor's; strange to say, the Chancellor discovered his chief enmities to lie in ambush beneath the judgment seat, and detected an anonymous slanderer in the person of a judge. The publication of this clever political libel, the discovery of its author, his exposure, trial, and punishment, form one of the most interesting yet singular chapters in the range of legal history.

In May, 1804, Mr. Cobbett was convicted of having libelled the Lord Lieutenant (Earl of Hardwicke), the Lord Chancellor and others, in some powerful letters signed Juverna, published in his Political Register. After his conviction, he gave up the manuscript letters, which he had received by post from Ireland, to government, who soon obtained evidence of the startling fact that they were in the handwriting of Mr. Justice Johnson, one of the puisne judges of the Court of Common Pleas in Ireland. Great excitement had been produced both in England and Ireland by the publication of Juverna's letters. They were universally believed to have been composed by the judge, and his official character doubled the point and energy, with which they were written. Having commenced his letter with a quotation, "*Equo ne credite Teucris*," the sarcastic magistrate, after playing for a while with the fable of the wooden effigy, proceeds—

"Not that I would be understood literally; I do not mean to

assert that the head of my Lord Hardwicke is absolutely built of timber; my application is only metaphorical, yet I cannot avoid suspecting, that, if the head of his excellency were submitted to the analysis of any such investigator of nature as Lavoisier, it would be found to contain a superabundant portion of particles of a very ligneous tendency. While I have been writing, a map of the West Indies happened to hang before me: suppose a powerful fleet of the enemies of the British name lay to windward, ready filled with troops for landing, whilst a desperate band of ruffians were secretly arming in its bosom: suppose a committee of West Indian proprietors should apply to Lord Haddington for support and assistance; and suppose he were to desire them to quiet their apprehensions, for that he had entrusted the care of their island to a very eminent sheep feeder from Cambridgeshire, who was to be assisted in all counsels by a very able and strong-built chancery pleader from Lincoln's Inn. Give me leave to reflect what would a sugar committee say to such an answer? I may challenge the most daring supporters of the present government to produce me one single act in the lives of either of these truly great characters, which can entitle them to claim one particle of trust or confidence from the public, beyond the bounds and limits within which I have encircled their exploits. On the chancery pleader, perhaps, I may have laid too great a stress; he is not of the first consequence, though, in a future letter, I may perhaps point out to you the mischiefs, which the intermeddling of such a man in matters out of the course of his practice may occasion."

In a subsequent letter, the writer drew a contrast between the conduct pursued by Lord Redesdale, and that which the late Lord Kenyon would have adopted.

"Had it pleased his majesty to appoint Lord Kenyon Chancellor over the warm-hearted principality, I can very well conceive what in such a situation he would have done, and, also, what he would not have done. From a rare modesty of nature, or from a rare precision of self-knowledge, Lord Kenyon would have acted with reserve and circumspection on his arrival in a country, with the moral qualities of the inhabitants of which, and with their persons, manners, and individual characters and connections, he must have been utterly unacquainted. In such a country, torn with domestic sedition and treason, threatened with foreign invasion, and acting, since the union, under an untried constitution, if Lord Haddington had required that Lord Kenyon should direct a Cambridgeshire earl in all his councils, Lord Kenyon would as soon, at the desire of

Lord St. Vincent, have undertaken to pilot a line of battle ships through the needles. Particularly the integrity of Lord Kenyon would have shrunk from such an undertaking, if a condition had been added to it, that no one nobleman, or gentleman, who possessed any estate, rank, or connexion in the country, should upon any account be consulted, his pride would have spurned at the undertaking. It was said of Lord Kenyon that he loved money ; if so, he loved his own money only, and not the money of any other man : Lord Kenyon, therefore, as Chancellor, never would have made any rule or order by the effects of which the secretary of a Master of the Rolls would be deprived of all fees for the purpose of throwing all those fees into the hands of the secretary to the Chancellor, the better to enable that secretary to discharge the pension of some unknown annuitant on his official profits. The professional pride and the inborn honour of Lord Kenyon would never have suffered him to enter into a combination to sap by underhand means the independence of his brethren the judges. He never would have suffered the great seal in his hands to be used for the purpose of garbling the bench, in order to gratify those who might be contented publicly to eulogize that government which privately they must have despised ; nor would he have employed any of his leisure in searching into offices for precedents by which he might harass the domestic arrangements of others, whose pride and integrity could not bend to his views ; and thus double the vigour of his attack by practising upon the hopes of some, and endeavouring to work upon the fears of others."

A true bill having been found by the grand jury at Westminster against the author of this attack, a warrant was signed by Lord Ellenborough for the apprehension of the Irish judge. He was arrested by virtue of an act 44 George 3, passed eighteen months after the publication of the libel, to prevent the escape of felons and other *malefactors* from England into Ireland, and vice versâ, it being enacted that if any person, against whom a warrant should be issued in England, for any crime or offence against the laws of England, should escape, go into, reside, or be, in any place in Ireland, it should be lawful for any justice of the peace for the place where such person should escape, go into, reside, or be, to indorse his name on such warrant, which should be a sufficient authority to apprehend the person against whom the warrant was granted, and convey him by the most direct way into England. The warrant being accordingly indorsed by a

justice of the peace for the county of Dublin, the judge was arrested (his friends said kidnapped) in his house at Miltown. On that evening a writ of habeas corpus was sued out, returnable immediately before the Lord Chief Justice. This was adjourned into the Court of King's Bench, where, after a solemn and eloquent argument, two of the judges delivered their opinions for remanding their brother judge into custody, and the other justice argued elaborately for his discharge. A new writ of habeas corpus was issued, returnable into the Court of Exchequer, where the argument occupied the Court three long days. Mr. Baron Smith alone, in an oration of exquisite finish, declared against the legality of the proceedings. The Common Pleas concurred with the majority, and Mr. Justice Johnson, being remanded by the rigid construction of an *ex post facto* law, was brought to trial (a trial at bar) in the King's Bench on the 23d November, 1805.

Mr. Perceval, then Attorney-General, in a speech of considerable eloquence and feeling, expressed his serious concern at having to conduct this most extraordinary and important case; a case in which he had the singular misfortune of being obliged, in his character of law officer to the king, to bring before that high tribunal a brother judge, and to charge that learned judge with the offence of being author and publisher of an anonymous libel against the government of his sovereign; an offence the most alien that could be conceived from every sentiment of a liberal and ingenuous mind, from every sentiment of honorable feeling, from every idea of the principles which guide all in the defendant's exalted station. The handwriting of the libel being proved by the belief of several competent witnesses, Mr. Adam, who led for the defence, had the difficult task of echoing every word the Attorney-General had uttered in condemnation of the libeller, as such topics confirmed the innocence of his client. "It was impossible a judge could be guilty of such meanness, and he would prove the writing to be another's." Mr. Gifford, one of the witnesses on whom he relied, baffled for a time, by his ready tact and repartee, even the practised ability of Mr. Garrow, as the following amusing extracts from his cross-examination fully testify:—

"Q. Do you mean to say all O's are round?"

"A. No sir, all O's are not round; but I say all English writings have a likeness to one another, otherwise they could not be read by Englishmen.

"Q. Then all Irish writing is alike too, I suppose?

"A. English and Irish writing is the same; I thought we were all one kingdom. Is there any difference?

"Q. In what does it resemble Judge Johnson's writing?

"A. The letters have something, at the first look of them, of his manner till you come to look into them.

"Q. What! just as your face, and mine are alike, till you come to look into them!

"A. Oh sir, you do me honour!

"Q. If I wrote in a similar hand to that an invitation to you to dinner with Judge Johnson, should you think it came from him, and attend accordingly?

"A. If it had come to me, as a card, I should have put it into a rack, and, when the day came, I should have gone to dinner. In an invitation to dinner a man seldom considers the writing.

"Q. You say that this writing is larger than yours, and that Judge Johnson's is larger than yours: this writing then may be Judge Johnson's?

"A. Oh sir, that is a gross *non-sequitur*!"

The jury, after a brief deliberation of scarcely a quarter of an hour, pronounced the judge guilty: a verdict rendered the more crushing by his miserable defence. Yet, strange to say, his character seemed exalted in the eyes of his eccentric countrymen by this conviction, and, as the libel flattered their prejudices, the author appeared to rise in popularity when there was no longer any doubt of his guilt. But "the times were out of joint" in Ireland, especially as regarded its judicial establishment. The Chief Justice Kilwarden had been lately butchered by a senseless and mistaken mob; a few years before the Hon. Richard Power, second Baron of the Exchequer, had drowned himself rather than appear personally to answer for the interest of some money received by him, as accountant general of the Court; at this very time another judge of the Common Pleas, Mr. Justice Fox, was under grave charges, brought forward by the Marquis of Abercorn in the House of Lords, and narrowly escaped an address for his removal. For the honour of the judgment-seat, and that a judge might not be brought on the floor of the King's

Bench to receive sentence as a criminal, government permitted a compromise, almost too favourable to the delinquent. Mr. Justice Johnson retired from the bench in 1806, on a pension of 1,200*l.* a year, which he continued to enjoy for many years, and his younger brother, Mr. William Johnson, was appointed Justice of the Common Pleas in his room.

His retirement preceded the dismissal of the calumniated Chancellor by the interval only of a few weeks. It was a matter of course that he should resign the seals on the accession of "All the Talents" to office; but for his abrupt discharge from the chancellorship, he had partly his own indiscretion and partly the rancorous hostility of the Whigs to blame. When Attorney-General, he had almost gone out of his way to make himself unpopular in Ireland. He had supported the union, and at the same time gave utterance to the unpalatable truth, "that it was not to be dissembled—Ireland knew her own history; he did not wish to speak harshly, but, in truth, Ireland must be considered as a conquered country. Those who wished to overturn the government, had said of it with some degree of truth, that it was provincial and not national; that it did not resemble the English government; that national objects were not pursued, but that the whole was conducted by a cabal. There was truth in the statement, and Ireland must be governed so while she remained in her present situation. The government now were afraid of the physical force of the country being turned against them. The large majority of the people were of different religions, though the bulk of the property lay the other way. If they were admitted into the legislation, the consequence would be, that having power, they would soon make property change hands; for to give men power, and to suppose they would respect property, themselves having none, was to expect a degree of virtue which men did not possess!"

True to these principles, from the first day of his landing at the Black Rock, whence he was conveyed to the Castle in what they call a jingler (a sort of jaunting car), to the huge delight of the Dublin populace, down to the moment of his compulsory retirement, he omitted no opportunity of expressing his dislike to the Roman Catholic priesthood, and his sense of the abasement of the Roman Catholic population. Not bearing

in mind the malicious exclamation of the patriarch, "Oh, that mine enemy had written a book !" he indited a semi-confidential letter to the Earl of Fingal, on the occasion of appointing him a magistrate, enlarging upon these favourite but most unpopular notions, and inculcating a jealous suspicion both of priesthood and people. The bitter reply and rejoinder soon stole into circulation, and almost maddened the excitable natives. The impolicy of the epistle was so manifest that his friends in parliament contented themselves with severely censuring its unauthorized publication ; whilst Canning and Fox vied with each other in loud reprehension of the writer. "The people of Ireland," said Fox, bitterly, "have never been very famous for discretion. It must no doubt then have been very gratifying to them to find that a grave English Chancellor, sent over to them, had been guilty of an indiscretion, to which indeed nothing could be second, for it was of that sort that nothing *simile aut secundum* could exist."

The Chancellor was too regardless of popular clamour to conceal his conscientious opinions, when taunted with them in the House of Lords. He stoutly maintained the justice of his strictures, stated that no Roman Catholic would live with a Protestant servant in his part of the country, and that they were ground down by their clergy to the lowest state of ignorance, degradation and crime. The hot blood of Lords Ormonde and Donoughmore boiled over at these cruel aspersions on their race, and they charged the learned lord with descending from his high station to calumniate the country, whose laws he was bound to administer without dislike or favour to any class. Though his impartial administration of justice was above reproach, the Whigs lost not an hour on their accession to office in placing the seals in commission, and rejoiced in offering up the obnoxious Chancellor as a victim to national prejudice. Of this harsh precipitancy he complained with a natural and proper feeling of indignation on bidding farewell to the bar, the whole particulars of which leave-taking are too full of interest not to be placed on record.

When Lord Redesdale sat for the last time on the bench of the Irish Court of Chancery, 4th March, 1806, he addressed the bar in the following speech :



“ I must now take my leave. When I came to this country, I thought that I should probably pass the remainder of my days here. With that view I formed an establishment, and I proudly hoped to have lived amongst you, and to have died amongst you, but that has not been permitted. To the gentlemen of the bar I have the greatest obligation. I came amongst them a stranger : I have experienced from them every kindness : and I must say that I could not have left a bar with whom I could have lived in habits of more cordial intercourse. Perhaps I may (on some occasions I am aware that I must) have used expressions which have appeared harsh at the moment, but, I hope, they were only such as were suited to the occasion. My design was not to hurt the feelings of any, and if I have done so, I am truly sorry for it. I wish to depart in peace, and in good will with all. To the officers and practitioners of the Court I must say, that, though with respect to a very few of the latter, I have had occasion to animadvert with some severity, their conduct in general has been highly satisfactory. As to the officers of the Court, they have all, in their several stations, endeavoured to assist me to the utmost of their power, they have materially done so and I owe them sincere thanks. It would have been my wish to have continued to sit, until the gentleman who has been named to succeed me should have arrived. I believe it was his wish also, and I have every reason to think so, and from him I have experienced every degree of politeness and attention. I am sorry that other persons should have thought me unworthy to have been entrusted with the seal during the interval. What can occasion this (which I cannot but consider as a personal insult) I am unable to guess ; but I have been informed that a peremptory order has come to the Lord Lieutenant not to suffer a moment to elapse in preventing the great seal from longer remaining in my hands. I know not whence this jealousy of me has arisen, or how my continuing to sit in the Court of Chancery (for I could make no other use of the seal, but under the warrant of his Excellency) could interfere with any views of his majesty’s ministers. I am proudly conscious of having discharged the duties of my station with honesty and integrity, to the best of my abilities. For the office I care not, except so far as it affords me the opportunity of discharging conscientiously an important public duty. It was unsought for by me. I came here much against my will. I came from a high station in England, where I was living amongst my friends and in the midst of my family. But I was told that I owed it to public duty and to private friendship to accept the office, and I yielded : I yielded to the solicitations of some of those who have concurred in my removal. This, I own, is



what I did not expect, and what I was not prepared to hear. But I feel most of all that so little consideration has been had for the public business, and the interests of the suitors of this Court.

“ You must all know the avocations of those who have been named as commissioners. The Master of the Rolls has already as much business as he can conveniently discharge ; the Lord Chief Justice and the Lord Chief Baron have their several avocations, which must prevent their attendance in the Court of Chancery. I am extremely sorry that a great deal of business will in consequence be left undone, which ought to have been disposed of before the rising of the Court, but so it has been thought fit ; and now I have only to say that, in returning to the country from whence I came, I shall be most happy, if it should ever be in my power to be of service to Ireland. Ireland will always have a claim upon me. Had I continued in the Commons' House of Parliament I might have been able to do much service ; in the other House that power is much lessened ; but, such as it is, this country may ever demand it. To this country I have the highest sense of obligation. I do not know that in a single instance I have experienced anything but kindness. I have experienced it from all ranks of people without exception. Under these circumstances I retire, with a firm conviction that you will do me the justice to say that I have discharged my duty with honest and conscientious zeal, to the extent of my abilities, and that on this head I have nothing with which to reproach myself.”

The Chancellor, says Plowden, in his History of Ireland, was much agitated, and shed tears profusely. His address, pronounced in a manner dignified as well as pathetic, excited strong and general sympathy. After a pause of a few moments, the Attorney-General, Mr. O'Grady, rose, and in the name and by the direction of the bar, addressed Lord Redesdale in these words :

“ Thus called upon, and having had an opportunity of communicating with a great majority of the gentlemen, who have practised in the Court of Chancery, during the time that your lordship has presided, I feel myself authorized to express their sentiments on this occasion. We have a just sense of those endowments, which have so eminently qualified you to preside in a Court of Equity. Whilst your impartial attention has secured to the honest suitor the full investigation of his claims, your sagacity and patience have taken away from fraud all hope of impunity, and all pretext for complaint. We return your lordship our thanks for the instruction which

we have received in attending to the series of decisions by which, during the period of four years, you have advanced the science we profess. But, most peculiarly, and from our hearts, we beg leave to make our grateful acknowledgments for the uniform courtesy and kindness which we have experienced from you in the discharge of our duty at your lordship's bar. Under these impressions we take leave of your lordship; the consciousness of having thus well discharged the duties of an elevated and important station must render you independent of our praise; we trust, however, that this sincere tribute of esteem and gratitude which is now offered will not be deemed unacceptable."

Far different from the respectful regret of the bar was the exultation of the populace. Plowden says, "the instantaneous removal of Redesdale from his situation, even before his successor had arrived in Ireland, diffused incalculable satisfaction through every rank of the Catholic population, which he had so coarsely and unfoundedly insulted and traduced."

We cite this passage of a vehement partisan to prove the detestation in which the Chancellor was held by those vast masses of which the historian formed the organ. However much the sympathy of the bar may have soothed his wounded feelings, there were not many voices there to cry on his departure "God bless him;" and to what extent soever the law suffered by his removal, the estrangement between him and the Irish people was too complete to permit of his resuming the seals in the following year, when his friends regained the government; or even at a later period, when his brother-in-law had become the head of the ministry. His happy circumstances in domestic life, and large independent fortune, had probably rendered the ex-Chancellor less anxious for official trammels, and now that "the grey hairs had something mingled with his younger brown," not over importunate for place. "At Perceval's table," writes Sir Egerton Brydges, "the Lord Chancellor Mitford, now declining into years, found a wife in his sister, who was verging to that character which Hayley so offended Mrs. Elizabeth Carter by placing her at its head, in his novel of the 'Old Maid.'"

Accordingly, in June, 1803, Lord Redesdale was married by Bishop Barrington to Lady Frances Perceval, seventh daughter of the Earl of Egmont. By this marriage, fortunate

in every respect, he had a family of three children: one son, John Thomas, the present Lord, born at his seat in Ireland, in 1805, and two daughters, Frances Elizabeth and Catherine.

In 1807, by the death of his relative Mr. Freeman, he succeeded to a large estate and Batsford Park in the county of Gloucester. Having no domestic cares, but such as constitute at once the duty and pleasure of every country gentleman, active in his mind and habits, and justly deeming his title and retiring pension retainers for his country's service, he joined assiduously in the discussions of the House of Lords, was unremitting in his attention to appeals, and by his elaborate judgments gave general satisfaction both to the practitioners and suitors in that high court of appellate jurisdiction.

Upon all topics connected with Ireland he brought to bear his inveterate habits of patient research, and it is only an act of justice to his memory, which has suffered from the reproaches cast upon his alleged prejudices, to show, by his letters and speeches, how well he understood the cause of the evils under which that country groans. How much unhappy truth is there in the following representation which he made when Chancellor to Mr. Wilberforce :

“ DECEMBER 18th, 1805.

“ My dear Sir—Your letter of the 12th, dated from the Temple, near Leicester, has found me in my country retirement, but retired, not because I ought to have leisure for retirement; but because the gout in its consequences has disabled me from doing business: the pain of the disorder has left me, but it has produced a languor, which deprives me of rest. For near a month, first from pain, and then from its consequences, I have seldom enjoyed an hour's sleep in any one night. Air, and exercise, and medicine, have been all hitherto tried in vain. I hope, however, by degrees to recover my strength and ordinary rest, when my mind shall be wholly relieved from the anxiety of business.

“ It gave me much pleasure to find that the remembrance of an old friend was so acceptable to you. I often think of my friends in England, and regret the spot where alone ‘English minds and manners may be found.’ You are in a considerable degree right in the judgment you have formed of this country, and of the mistakes of English ministers with relation to it. It is true that the diseases under which Ireland labours are principally moral and social, and

that now the Parliament is gone, its political diseases are comparatively small. But the diseases under which it has so long laboured have so contaminated the minds of the people, that it will require much time and much care to restore them to a sound moral and social state. Our friend, Lord Wellesley, lately sent me Major Wilks's Report of the Interior Administration, &c. of the Government of Mysore, and I was much struck with some passages, as demonstrative that the same causes will almost universally produce the same effects on the minds of men. In page 26, speaking of the manner in which causes are decided in Mysore, Major Wilks observes, that it is a fixed rule of evidence to suspect as false the testimony of every witness, until its truth is otherwise supported. A barrister in high practice at the Irish bar gave me, almost in words, the same caution soon after my arrival here, and it has been confirmed to me since by many. Major Wilks states conversations with the Dewanny of Mysore, and other intelligent persons, in which they avowed, as an abstract proposition founded on experience, that the presumption is infinitely stronger against the veracity than in favour of the truth of a witness, and the Major concludes by attributing the defective morals of the people of Mysore to the habitual necessity of opposing fraud to force under the despotic governments which had oppressed them; and that a better order of things would probably reduce the evil. He also supposes the religious system of the country may in this point be particularly defective, and may not produce that influence over the morals of the people, which has been considered as the best security for the probity of men. It seems to me, that, in both these points, there is a strong resemblance between Mysore and Ireland; and that the removal of an openly corrupt Parliament, a due administration, a strong civil government, affording full protection to the weak against the strong, assisted by a better sense of religious duty, will correct the defective morals of the people of Ireland. Above all, I believe that the extension of the representation throughout the country would operate strongly and decisively. The Roman Catholic priest in Ireland never teaches to his flock the first obligation of moral duties. Superstitious observances tend much more to his profit and to the maintenance of his authority. He severely punishes a slight breach of these observances; he readily grants absolution even for murder, or a very slight penance. The bad morals of the Roman Catholics corrupt the morals of the Protestants. They are induced to oppose falsehood to falsehood, fraud to fraud, force to force. There are still large districts in Ireland in which it may be said the king's writ does not run; that is, it is obeyed or disobeyed at

the will and pleasure of the most powerful. The establishment of schools is rapidly increasing in Ireland, and the diffusion of something like knowledge must do good. The Archbishop of Cashel observed to me the other day, that men who were taught to read, and by degrees got books into their hands, would soon cease to be the dupes of such an abject superstition, as led them to eat the ashes of a dead priest as a preservative against evil. Much is doing and may be done in this way, and if ministers will but give attention to those who see Ireland in Ireland, twenty years may produce a great change. I have written a long and, I fear, a tedious letter, and Lady R. reminds me I have written too much. She begs to join in respects to Mrs. Wilberforce, as well as yourself, with, my dear Sir,

“ Your faithful humble servant,

“ REDESDALE.”

A single passage from his many speeches on the never-failing subject of Irish affairs will suffice to show his habits of minute observation, and the practical utility of his suggestions :

“ A gentleman he knew had let 13,000 acres for lives, or a long term of years, reserving 800 acres of demesne lands, and now he had a greater rent from the 800 acres than from the 13,000. A great proportion of the Irish tenures are grants of long terms at low rents. When such small rents had been retained by the original landlord, the lands would naturally sub-let perhaps six deep, the rents rising progressively. In Ireland, he was sorry to say, the remedy of distress was more commonly applied than in England. Almost every estate had what was called its driver. The occupiers, unfortunately, often took the lands at more than they could pay, except in plentiful years, and only the produce of the land remained to pay the rent. This gave occasion to many frauds in removing that produce, and these, he was sorry to say, had a bad effect on the character of the Irish peasantry, which was not what one would wish it to be. They had in general no capital, the rent could only be paid out of the produce of the land, and a bad season consequently disabled them to pay. They should cast altogether in their minds, whether the sub-demising of lands, with a power of distress, might not be checked ; whether it might not be provided that afterwards no sub-letting, with such a power, should be allowed.”

The evils thus clearly marked out, are, fortunately for Ireland's peace, in progress of removal. Of the gigantic mis-

chief, which the ex-Chancellor denounced in such forcible terms as to have become proverbial, there will soon, we may hope and believe, remain no trace. He declared, in 1822, "that he had been connected with that country for the last twenty years, and he was sorry to say that there existed in it two sorts of justice; the one for the rich, and the other for the poor, and both equally ill administered."

The only law peer in the House of Lords, who had sufficient leisure to attend to legislative reforms, (for Lord Eldon was one of those sovereigns who could bear no brother near the throne,) Lord Redesdale, in conjunction with the eccentric Lord Stanhope, studied the order-book diligently, and, though he obstructed several valuable measures, he introduced others of sound practical utility. Of these his chief and crowning reform was the Insolvent Debtors' Act, the painful labour of several sessions. The draft of the original scheme was crude and undigested, but its author proved to demonstration the impolitic cruelty of the law, as it was then administered, and, with the aid of several Committees, at length perfected a measure, which not even the vehement hostility of Lord Ellenborough, nor the undermining opposition of the Chancellor, could overcome. The chief justice protested against going into a committee of inventions, and declined becoming the drudge to carry out new-fangled conundrums. When Lord Redesdale apologized for some mistakes in the Report which he had drawn up for the Committee appointed to investigate the laws of debtor and creditor, Lord Ellenborough observed sneeringly, that his noble friend might have the same consolation that was offered to a contrite author, who expressed in his latter days great apprehensions lest his writings should do injury to posterity, when his friend bade him be easy, for nobody had ever read them.

In private Lord Ellenborough's violence knew no bounds. He declared that the act was nonsense and unintelligible, and that Lord Redesdale ought to be put in a strait waistcoat. Far different was the effect of his salutary reform on the mind of the humane Sir Samuel Romilly, whose pathetic eulogy seems marked with no less truth than feeling. "Had such a bill been passed at the beginning of the present reign, how much

misery might have been averted; how many hearts, now broken down with sorrow, might have beat high with exultation, at having regained that station in society, which they had once adorned, and at having been enabled to fulfil with honour, those engagements which, though interrupted by misfortune, had been rendered impracticable only by subsequent persecution.

The legislative schemes of the ex-Chancellor were not restricted to this one measure, however admirable. He suggested a method, since adopted, to enlarge the sum, for which persons could be arrested on mesne process, and brought in a bill to carry county courts into full effect throughout England. He was compelled to relinquish both proposals, as they did not meet with the sanction of government, but the seed, which he cast upon the waters, germinated after many days. The bill for appointing a Vice-Chancellor, whose practical utility has been made so manifest, that two additional judges, with the prospect of further increase, have been recently appointed, was introduced into the House of Lords under Lord Redesdale's auspices, and enforced, in spite of much obloquy and a strenuous opposition, by his announcement, that, of the 270 appeals and writs of error then on the table, the last, according to the mode of hearing hitherto acted upon, could not be decided for eleven years from that time. Life should have been protracted to its period before the deluge, to let an unhappy suitor linger in silence beneath the pressure of such an enormity.

Lord Redesdale also prepared a bill for the commutation of tithes in Ireland.

His merits as a sound legal reformer are the greater when we consider that the bent of his mind tended more to brave, than to court popularity; that he liked opposing better than yielding to the inclinations of the people, like those birds of strong pinion, who love to fly against the wind. In this spirit he resisted a free trade in corn, the emancipation of slaves in the West Indies, the repeal of the Test Act, and the emancipation of the Roman Catholics; he would not imitate the conduct of the Saxons, "in buying off the Danes." He also resisted all those admirable improvements, which Romilly sought to engraft on our criminal code; and he contended that all objections against the influence of the crown were at all times the result of clamour, and not of principle.



When it was proposed in 1817, to legalize the receiving voluntary contributions from persons holding offices and pensions, Lord Redesdale inveighed against the measure. He had supported the property tax, but he deprecated the plan of a partial taxation to be paid under the compulsion of public odium ; “for his own part, he was determined not to be *hooted* out of his money.” On the discussion of questions of finance he always entered with much zest, and composed several essays, which are still preserved in the Pamphleteer.

The Rev. Mr. Sinclair, in the life of his father, mentions that among Sir John’s most voluminous correspondents upon currency, may be classed this acute lawyer and experienced politician. From his valuable letters he extracts the following very curious prediction :—

“ The present system (1822) seems to me likely to produce a continual change in the relative values of agricultural produce and money ; a continual depression of the agricultural interest, and finally general distress, and a total subversion of the British constitution, founded and dependant as it is on landed property. In truth, it seems to me to lead directly to radical reform, revolution, and all the evils which radical reform has produced in France, and is now producing in Spain.”

His last political lucubrations upon Ireland, are in our judgment more valuable than his prophetic statistics.

“ With respect to Ireland generally, and with respect to the Catholics particularly, the government has at all times been very ill conducted. As the Attorney-General of James I. said, ‘ Ireland was never fully conquered,’ and was never made duly obedient to law. When the constable cries ‘ Stop thief,’ the people cry ‘ Stop the constable.’ Mr. Pitt, Mr. Fox, and every minister for the last forty years and more, have constantly, grossly, mismanaged with respect to Ireland. The first great blunder was in Lord Townsend’s lieutenancy, when, to get rid of the Ponsonbys and that faction, Lord Townsend set up the Beresfords and that faction, and handed over Ireland from the former to the latter. The Ponsonbys and their faction before that time called themselves the heads of the Protestant interest, and ruled Ireland as they pleased. When deprived of their power, they turned round to the Catholics, and became the advocates of emancipation. Had the lord lieutenant had the good policy, when he had knocked down the Ponsonby faction, to play the two factions against each other, allowing the Ponsonby

faction a fair share of interest and power, they would not have turned Catholics. But like Satan they thought it 'Better to reign in Hell, than serve in Heaven,' and they have in consequence played the very greatest mischief in Ireland. If I were asked what should now be done, I should say nothing, until Ireland can be made fully obedient to law; and it is the fault of the government that Ireland is not obedient to law. If I were told that something must be done, I should deny the must; but if the minister should say, I will do something, but not all, I should say, then you must no longer coquet with the Catholics, but say, this I will do, and no more. Take what I offer or not as you please. All the Catholics of property would take what was offered, and the priests and agitators would refuse; and then the question would be whether the Catholics of property or those with no property were to rule? The whole business, as managed by every government for many years, has been a tissue of folly, and ministers seem never to have collected any wisdom from what has happened. The world at present is enjoying the benefit of the march of intellect, which has been (perhaps truly) called the 'Rogues' March.' "

Upon other subjects still more immediately connected with his recollections as a lawyer, and duties as a peer, Lord Redesdale wielded the pen of a ready writer. In 1826 he wrote a valuable pamphlet entitled "Considerations suggested by the Report made to his Majesty under a Commission, authorizing the Commissioners to make certain Inquiries respecting the Court of Chancery." In the popular language of the day, it smashed the report of the Chancery Commissioners, and expressed in pointed terms the opinion of the experienced author, that every thing connected with the administration of justice had grown to a bulk and dimension which rendered the business unmanageable. "The solicitors, according to him, were at once above their occupation and below it. The briefs, ironically so called, were swollen to an extent which rendered them unfit for use. The speeches of counsel, sore let and hindered by the quantity submitted to their perusal, were extended upon the principle of compensating for defect of value by amount. Acts of Parliament were too long, and the speeches thereupon, also bills and answers, declarations and pleas, deeds of all descriptions, and conveyances particularly, were too long, judgments were too long, and so were the reports of them. Formerly in five minutes' reading an intelligible point of law was presented

to the mind, now you might read an hour or two and collect no point at all. Everything, in a word, according to the learned lord, partook of this besetting and prevalent vice.

The author of this sarcastic commentary upon Lord Redesdale's pamphlet (proved by internal evidence to be Lord Brougham) adds pleasantly, "We are sure that his lordship is much too good humoured a man to be angry, if we remind him, that long speaking at the bar is not quite a modern invention. We recollect to have heard of a certain learned solicitor-general who took eight or nine hours to his share in one trial in 1795."

In 1820 Lord Redesdale drew up a most valuable Report for the Lords' Committees, appointed to search the journals of the House, rolls of parliament, and other records and documents for all matters touching the dignity of a peer of the realm. He established an important truth, that the present constitution of the English legislature was not older than the thirteenth century, and pursued his researches with unwearied acumen and diligence. We have frequently profited by these remarks, says the Edinburgh reviewer (vol. 35), and learned to hesitate from their doubts. "We owe this further praise to the commissioners, that their inquiries appear to have been conducted with every disposition to fairness and impartiality. We have not found in their report any undue bias in favour of the crown, and have been seldom offended with any of the ancient Tory prejudices against popular claims. When they have occasion to notice an act of doubtful authority on the part of the king, there is no attempt to mislead or deceive us by saying it was done by virtue of the inherent prerogative of the crown. The commissioners distinctly acknowledge that at all times a supreme authority existed in England different from prerogative." "Their view (Lord Redesdale loquitur) of the various documents to which they have had recourse, has tended to convince them that, whatever may have happened in practice, the prince on the throne was at no time considered as constitutionally above the law, and that, to use the language of an eminent writer, Sir John Fortescue, Chief Justice of the King's Bench in the reign of Henry VI., and afterwards his Chancellor, when an exile in France, the government of the King of England was not simply regal, but political; and that

the maxim, 'Quod principi placeret legis habet vigorem,' was never a general maxim of the constitutional law of England. But though such was probably then, as well as in later times, the theory of the constitution of the English government, in practice the exertions of power by the crown often went beyond their legal bounds, and there did not always exist that ready and constant control, which now keeps the constitutional system in its true order. That control has been principally produced, and made effectual, by the necessary expenses of the state, which gradually exceeded, and at length vastly exceeded the hereditary revenue of the crown, so that the government of the country could not be carried on by the king without frequent, and, latterly, without constant, recourse to the authority of the legislature, to provide the necessary supply."

After pointing out many errors in the Report, the reviewer concludes with the following half-complimentary recognition of the author.

"We consider ourselves greatly indebted to the commissioners for their labours, but have deeply to lament that so much industry has been conjoined with such negligence. That so much unnecessary caution on some topics has been accompanied with such rashness of assertion on others, and that so many sound and liberal views respecting our ancient constitution have been obscured by prejudices from the school of Brady and other enemies of popular rights. We know no other way to reconcile these inconsistencies, unless on the supposition that the author of the Report is a young adventurer in the paths of constitutional antiquities, who brings with him to the pursuit an active mind, exercised in subtle and minute investigations, but who is still dazzled by the novelty of the scenery, and not yet sufficiently acquainted with the region he attempts to explore, to know in what quarter to direct his steps, or on what object to fix his attention; while his judgment is warped and perverted by the false and prejudiced accounts he has perused of former travellers, on whom he obstinately pins his faith, in opposition to the evidence of his own senses."

As might be conjectured from this Report, Lord Redesdale was the leading authority on the law of peerages. In some cases, especially the Banbury and L'Isle peerages, he is supposed to have carried his rigid scruples against obsolete claims to an unreasonable excess. He led the opposition to Lord Erskine's motion, that General Knollys had made out his

claim to the title, dignity and honour of Earl of Banbury ; and prefaced his ingenious remarks with an appeal to the prejudices of his hearers. " This is a question not simply between the crown and the claimant ; it affects every earl, whose patent is of subsequent date to the patent of William, Earl of Banbury." It would be difficult, says Sir Harris Nicolas, in a note to his report of the trial, " to comment upon this sentence with too much severity. As evidence of the *animus* with which the speaker approached the subject, it is, however, very important, and when it is remembered that his lordship was then acting both as a judge and a juryman, and was addressing a body of persons to whom the same duties were entrusted, that he had once filled a high judicial office, and that his opinions had great weight, this appeal to the prejudices of his auditors was, to say the least, highly objectionable. Let it be supposed for a moment that a judge should commence his charge to a jury in these words : ' This question affects every one of you, gentlemen of the jury, who holds his lands by a deed of a subsequent date to that on which the plaintiff's title rests, and the validity of which you are now to determine.' "

" When the petition," added the learned lord, " of Nicolas, the ancestor of the claimant, came under the consideration of the House in 1661, the Committee of Privileges, to which it was referred, instead of reporting whether the claimant was legitimate, or illegitimate, came to the extraordinary resolution, that he was legitimate in the eye of the law. It may safely be inferred that the expression could only be introduced to show that the law and the fact were at variance. Now what was the law, which the committee followed on this occasion ? Not the law of England, for it would have led them to a different conclusion ; but a certain law, laid down by Lord Coke in his *Commentary on the Institutes*. I have a great respect for the memory of Lord Coke, but I am ready to accede to an observation, made by some of his contemporaries, that he was too fond of making the law, instead of declaring the law, and of telling untruths to support his own opinions. Indeed, an obstinate persistence in any opinion he had embraced, was a leading defect in his character. His dispute with Lord Ellesmere furnishes us with a very strong instance of his forcing the construction of terms, and making false definitions when it suited his purpose to do so."

Sir Harris Nicolas submits that those who are best acquainted with the speeches and opinions of the noble lord, will smile at his description of Lord Coke, and may perhaps exclaim

“ Mutato nomine, de te  
Fabula narratur.”

Whatever objections, however, may be pointed out by deep antiquarians, or black letter lawyers, to his judgment, it must be admitted that he placed the law of legitimate descent on a more rational footing than it had ever stood before, and that, in exploding the old doctrine of *quatuor maria*, he consulted the dictates of sound common sense.

Lord Redesdale was so jealous of claims to peerages made after a lapse of centuries, that he gave notice of his intention to introduce a bill into parliament to make a limitation of time, as applicable to a question of peerage, as to a right of any other description. We are glad that he never carried his intention into effect, for there would be a palpable injustice in fettering the claim to a barony with the same limitations which bar a civil action, in extinguishing by statute that right of an ancient heir which the crown itself is unable to destroy.

Incensed at the consequent rejection of his claim to the peerage, of his right to which he was so satisfied, that he persisted in describing himself as Baron Sudeley per legem terræ, Sir Egerton Brydges penned in revenge a violent critique on Lord Redesdale's judgment, and condescends even to caricature his personal appearance. “ His arguments on the Banbury Case,” says the disappointed critic, “ are unintelligible, full of contradictory sophistries, and suicidal. He seemed to be in the habit of taking each crotchet of his mind separately; all his mind was broken into exilities. He was a sallow man, with round face (*vide Cleopatra*), and blunt features, of the middle height, thickly and heavily built, and had a heavy, drawling, tedious manner of speech.”

The passage in Shakspeare, to which the splenetic baronet refers, is doubtless act 3, scene 3, of *Anthony and Cleopatra*, where the Egyptian queen, inquiring of her rival Octavia, asks,

“ Bear'st thou her face in mind; is't long, or round?

*Messenger*.—Round, even to faultiness.

*Cleo*.—For the most part too they are foolish that are so.”

The commentators add, " This is from the old writers on physiognomy. So in Hill's Pleasant History, &c. 1613. ' The head very round to be forgetful and foolish.' " But when Sir Egerton gravely attributes foolishness to the great law lord for this peculiarity, he only proves his own.

We remember seeing Lord Redesdale, then eighty years of age, conducting Miss Turner's divorce bill from Gibbon Wakefield through the House of Lords. He was looking round and rubicund, and presenting that appearance of cheerful old age, " frosty, but kindly," of which our peerage affords more numerous examples than any other nobility in Europe. He had a look of good humoured intelligence, that bore no approach to weakness, the model of a hearty old gentleman, such as all who knew and admired the passages of his life would have wished him to appear. For a few months more he continued in full enjoyment of his intellectual and bodily health, and then sank by gradual, unperceived decay, expiring painlessly at his seat at Batsford Park on the 16th January, 1830, in his eighty-third year.

Few lawyers have filled with credit so many and such distinct offices of trust and power, nor have any crowded into twenty-five years of unofficial life such an infinite variety of legislative and judicial good. By the well applied exertions of a long and active life, he has become a benefactor to all classes of his countrymen. Of his own order he commands the grateful esteem, for he watched the rights and privileges of his brother peers with almost jealous vigilance, and contributed to raise their Court of Appeal in the last resort, to that high consideration which it still bears. To his own profession he has bequeathed an excellent legacy, in his writings, and admirable judgments, elucidating, and confirming the law of real property. But of the humbler members of this great community, he merits in an especial manner the respect and homage, exposed as they are to fluctuations and distress; for it was he who first turned aside the law from indiscriminately visiting misfortune with the penalties due to crime alone, and stamped upon the Statute Book the great Christian precept, " to proclaim liberty to the captive, and the opening of the prison to those that were bound."

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## ART. IX.—STARKIE'S LAW OF EVIDENCE.

*A Practical Treatise of the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings. Third Edition, with considerable Alterations and Additions.* By Thomas Starkie, Esq. of the Inner Temple, one of her Majesty's Counsel. London. 1842.

OF the first three editions of a law treatise, the third is usually the worst. The original work is written with laborious care, and the author, filled if not warmed with his subject, and having a reputation to establish, exerts his best energies ; still, if the subject be one of any magnitude, errors will of necessity creep in, and much important matter will be omitted. In the second edition, in consequence partly of the suggestions of friends, partly of the strictures of enemies, and partly of the attention of the author himself, many of the former errors are corrected and the omissions supplied. But by the time that a third edition is called for, the novelty, and with it the interest, of the subject has worn off; what was formerly a pleasure is now a fatigue ; alterations perhaps have taken place in the law, and parts of the work must in consequence be recast ; even if this be not the case, many recent decisions must at least be noticed, in order to point out in what manner they support, vary, or overrule the principles laid down. Besides, the reputation of the writer is now established, and the crowded papers on his side-table show that the chief object of his labours has been obtained. The consequences are inevitable. The last edition is worse than the first.

Now whether the above observations be fanciful or true, they certainly could in no way be supported more strongly than by referring to Mr. Starkie's last edition of his *Treatise of the Law of Evidence*. The edition had long been expected. The excellence of the original work, and the known ability of the author, led us to hope great things. Since the date of the former edition, indeed, many and great improvements had been made in the law, and we were fully aware that the task of preparing a fresh edition of the work before us was one of no ordinary difficulty. But we knew that, if any man in the profession could perform that task, Mr. Starkie was that man : we felt that the favour shown to the former

editions would, or at all events should, operate as a claim on his continued exertions : we were told by the booksellers that he was *slow*, we believed him to be *sure*: in short we confidently anticipated a most useful and able publication. The edition has at length appeared ; we wish it had not; for we will venture to say, and we say it with real sorrow, that a work more negligently executed has seldom been presented to the notice of the profession. We do not here allude to the minor repetitions, errors and omissions, numberless though they are: neither do we now refer to the clumsy patchwork which is alike conspicuous and discreditable ; least of all do we intend to notice the numerous errors of the press, the inferiority of the paper, or the badness and variety (see p. 722, 723, 2d vol.) of the type ; for these last are the faults of the publishers, who will probably have their reward ; but we speak of the total omission, or, at best, most careless insertion of large and important subjects connected with the law of evidence.

To establish the correctness of this censure, it will be necessary, first, to enumerate the chief alterations which have lately been effected in the law, so far as they relate to the subject of the work before us ; and then to examine the work itself, and see how these alterations have been noticed by the author.

The statutes restoring competency to certain witnesses, the new rules of pleading and the power of amendment at the trial given to the presiding judge, the new statutes of limitation and prescription, and the last amendments in our criminal law effected by the late acts of Victoria—these are some of the leading subjects which one would naturally expect to find fully discussed in any treatise on the Law of Evidence as at present administered in England ; more particularly so if the author should undertake, as Mr. Starkie has done, to write three closely printed octavo volumes on this branch of the law, two of which are wholly dedicated to the proofs necessary to sustain particular issues. Now let us see how each of these subjects has been treated by Mr. Starkie.

The alteration in the law of evidence effected by the stat. 3 & 4 Will. 4, c. 42, is very material, for “ in order to render the rejection of witnesses on the ground of interest

less frequent," the 26th section enacts, "that if any witness shall be objected to as incompetent on the ground that the *verdict or judgment* in the action on which it shall be proposed to examine him, *would be admissible in evidence* for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in that action in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him." The 27th section provides, "that the name of every witness objected to as incompetent on the ground that such judgment or verdict would be admissible in evidence for or against him, shall at the trial be endorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence." The language of the act is simple, and the general meaning plain; and Mr. Phillips, in his *Treatise on the Law of Evidence*, has very properly said, that the effect of this enactment is "to remove the objection of the competency of the witness, by removing the interest out of which the objection arises," and "to render all witnesses competent, as far as regards objections from interest, unless it can be shown that they have a *direct* interest in the event of the particular suit." Now turning to Mr. Starkie's work, we find at vol. i. p. 19, that "what constitutes a legal interest in the event of a cause," so as to disqualify the witness from giving evidence, "may be stated generally to be, either a *direct and certain* interest in the event of the cause, or an interest in the *record* for the purposes of evidence." Again, at vol. i. p. 167, it is said, that a residuary legatee is not a competent witness in an action against the executor, "for the *judgment* would afterwards *be evidence against him*."

At vol. i. p. 107, indeed, notice is taken of the statute, but

“ as doubts have been entertained upon its construction and operation,” it is proposed to consider the law independently of the statute, “ and afterwards to cite the act itself *and the decisions upon it*, with a few remarks.” The subject of incompetency from interest, is then divided into three heads. “ 1st, Where actual gain or loss would result simply and immediately from the verdict and judgment.—2d, Where the witness is so situated that a legal right or liability, or discharge from liability, would immediately result from the verdict and judgment.—3rd, Where the witness would be liable over to the party calling him in respect of some breach of contract or duty on the part of the witness involved in the issue.” Now we do not quarrel greatly with this arrangement, though we think many of the cases cited in illustration of these heads are calculated to mislead the student, but we certainly were a little surprised when, at vol. i. p. 119, we read that, “ 4thly, A witness is incompetent, where the *record* would, if his party succeeded, be evidence of some matter of fact to entitle him to a legal advantage, or repel a legal liability ;” for whatever doubts may have arisen as to “ the construction and operation of the statute,” it is quite clear that it embraces all the cases included under this head.

A discussion of the statute follows, and some sensible observations are made regarding its object, though we should find it no easy matter to carry out and apply the distinction taken between the effect of a record when “usable as establishing a right or liability by virtue of its legal operation, or when operating simply as evidence of some matter of fact.” Two *nisi prius* decisions are then cited, vol. i. p. 196, which were overruled in *Yeomans v. Legh*, 2 M. & Wels. 419; but the recent cases of *Bowman v. Willis*, 3 Bing. N. C. 669; *Knight v. Woore*, 7 C. & P. 258; *Groom v. Bradley*, 8 C. & P. 500; *Jackson v. Galloway*, ditto, 480; *Steers v. Carwardine*, ditto, 570; *Robinson v. Ferreday*, ditto, 752; and *Wedgewood v. Hartley*, 10 Ad. & Ell. 619, which all, more or less, illustrate the practical working of the statute, are wholly omitted. We may here observe that a few pages might, with profit, have been bestowed in pointing out instances where witnesses, though no longer incompetent on the ground of the admissibility of the verdict, might still be held so, as interested in the event of the suit.

The new rules of pleading, limiting as they do the effect of the general issue, and circumscribing the species of evidence that may be proved under it, have introduced a most important alteration in the law of evidence. On the first promulgation of these rules, the opinions of the highest members of the profession were much divided as to the extent of their operation. Many difficult questions arose respecting their construction; and even now, with all the light that has been thrown upon them by numberless decisions, it is often a matter of much nicety to decide what defences are admissible under the general issue. We expected therefore that Mr. Starkie would have exerted his best energies in unravelling this puzzled skein, and would have enriched his work with copious references to the recent decisions. We hoped to find arranged under proper heads, 1st, what matters of defence in each form of action *can only* be proved under the general issue; 2dly, what matters of defence *may* either be proved under that plea, *or* included in a special plea; and 3dly, what facts can only be proved or denied when pleaded specially. Great then was our surprise and disappointment when, on looking to the head "Rules of Court," vol. iii. 979, we found the new rules of pleading copied out verbatim, and just *three cases* from the 9th vol. of Messrs. Carrington and Payne's Reports, explanatory of their operation!!<sup>1</sup>

Nor was our search much more successful, when under the head "Variance," vol. i. p. 496, we looked for the authorities which mark the construction that has been put by the judges on the 23d section of the stat. 3 & 4 Will. 4, c. 42. That section enacts, that any court of record in civil actions, or any judge at nisi prius, may cause the record, writ, or document, on which any trial may be pending, when any variance shall appear between the proof and the recital on the record, &c. of any contract, custom, prescription, name, or other matter, in any particular, in the judgment of such court or judge, not *material to the merits* of the case, and *by which the opposite party cannot have been prejudiced in the conduct* of his action, prosecution, or defence, to be forthwith amended in the manner and on the terms therein mentioned. "And in case such

<sup>1</sup> A valuable little work on Pleading the General Issue, was published by Mr. Lutwyche in 1838; and much information on the same subject is contained in the "Precedents in Pleading," of the late Mr. Joseph Chitty, jun.—*Edit.*

variance shall be in some particular, not material to the merits of the case, but such as that *the opposite party may have been prejudiced* thereby, in the conduct of his action, prosecution, or defence," then the amendment is to be made on other terms. Power is also given to any party, who is dissatisfied with the allowance of an amendment, to apply to the Court for a new trial; and the 24th section provides that in doubtful cases the judge, avoiding the responsibility of deciding, may direct the jury to find the facts according to the evidence, and leave the question of the materiality of the variance for the consideration of the Court above.

Mr. Starkie cites this act, but makes no comments upon it, and does not so much as inform the reader whether the judges have held that the power of amendment given thereby should be liberally exercised. He could have had no difficulty in solving this question, since at least *four* recent cases have decided it in the affirmative. He contents himself with referring, in something less than two pages of notes, to a few cases on the statute; the latest of which was decided more than *five* years back. All of these, too, almost without exception, are to be found, and in the same order as they are taken by Mr. Starkie, in the last edition of Mr. Phillips's Treatise, published in 1838. Not one word on the important cases of *Beckett v. Dutton*, 7 M. & Wels. 157; *Brashier v. Jackson*, 6 M. & Wels. 549; *Duckworth v. Harrison*, 5 M. & Wels. 427; *Boys v. Ancell*, 5 Bing. N. C. 390; *Saunderson v. Piper*, 5 Bing. N. C. 425, 561; *Whitwill v. Scheer*, 8 Ad. & Ell. 301; *Sainsbury v. Matthews*, 4 M. & Wels. 343; *Ward v. Pearson*, 5 M. & Wels. 18; *Evans v. Fryer*, 10 Ad. & Ell. 609; or *Doe d. Parsons v. Heather*, 8 M. & Wels. 158.

In like manner, under the head "Limitations," the late Statute of 3 & 4 Will. IV. c. 27, limiting actions and suits relating to real property, is in part set out *totidem verbis*, and in part briefly described, but only one modern case is vouchsafed by way of illustration. Under the head "Ejectment" indeed three or four cases are cited which relate to the statute. It might have been more convenient to have inserted these in conjunction with the sections of the act to which they refer, but we must not complain, as we are only too fortunate in finding them at all. We looked in vain for *James v. Salter*, 2 Bing.

N. C. 505, and 3 Bing. N. C. 544; Doe d. Davy v. Oxenham, 7 M. & Wils. 131; Paget v. Foley, 2 Bing. N. C. 679; Holmes v. Newlands, 11 Ad. & Ell. 44, and other cases on the same subject, and we were equally unsuccessful in our search for the Statute of 7 Will. IV. and 1 Vict. c. 28, which brings mortgagees within the definition contained in sect. 1 of 3 & 4 Will. IV. c. 27.

Again, under the head "Prescription," vol. iii. 911, Mr. Starkie, in speaking of "Presumptive Evidence," considers those cases "where the law makes no conclusive inference, but nevertheless gives to the evidence a *technical* efficacy beyond its simple natural force and operation." He then adds, "Under this head are to be classed the presumptions of legal title, by grant or otherwise, to incorporeal rights in the lands of others, founded on the adverse possession and enjoyment of such rights for the space of twenty years." To this there is subjoined the following note:—"Subsequently to the writing the observations under this head, a great change has been made in this branch of the law by the Statute 2 & 3 Will. IV. c. 71" (passed 1st August, 1832—nine years and a half ago). "As this statute does not exclude a party from any plea which was available before, but attains the same end by *less objectionable means*, it has been thought to be advisable to retain them, subjoining to them the provisions of the statute, *with the decisions upon it which have since occurred*." How the intention expressed in these last words has been fulfilled we shall presently see; but in the meantime, turning to Mr. Starkie's text, we find that, with a kindliness which we might almost imagine was the result of fellow feeling, he has printed eight crowded pages for the express use of bungling pleaders, who, disregarding the new statute, or ignorant of its existence, still boldly determine to effect their purpose by "more objectionable means" than the act affords, and pleading a right from time immemorial, thus ruin their clients without the aid of the legislature.

At p. 919, the Act for shortening the Term of Prescription in certain cases is set out, and one or two notes appended to the different sections give hopes, by their length, that here at least the decisions upon the act have been collected and discussed, in accordance with the declared purpose of the author;



but upon examination it appears that the important judgment of Mr. Baron Parke, in the case of *Bright v. Walker*, 1 C. M. & R. 217—important in itself, and doubly important as it cites with approbation what “was very properly said by Mr Starkie” in the former edition of his *Treatise*—occupies nine-tenths of the space allotted for the illustration of this act. In the remaining space brief allusion is made to four or five other cases, but the following decisions, with others on the same subject, are not noticed at all: *Wickham v. Hawker*, 7 M. & Wels. 63; *Manning v. Wasdall*, 5 Ad. & Ell. 758; *Bailey v. Appleyard*, 8 Ad. & Ell. 161; *Richards v. Fry*, 7 Ad. & Ell. 698; *Flight v. Thomas*, 11 Ad. & Ell. 688, affirmed in Dom. Pro. 14th June last; *Parker v. Mitchell*, 11 Ad. & Ell. 788; *Magor v. Chadwick*, 11 Ad. & Ell. 571; *Wright v. Williams*, 1 M. & Wels. 77; *Lawson v. Langley*, 4 Ad. & Ell. 890; *Kinloch v. Nevile*, 6 M. & Wels. 795. The case of *Arkwright v. Gell*, 5 M. & Wels. 203, though omitted here in its natural place, is quoted under the head “*Watercourse*,” p. 1251.

Respecting the statutes, which in July, 1837, produced so material a change in our criminal law, it will not be necessary for us to say much, for Mr. Starkie has said nothing. In this voluminous work, bearing date 1842, and entitled a *Digest of Proofs in Civil and Criminal Proceedings*, not one hint can be found, at least after a careful search we have failed in finding any, from which it can be collected that the author is even aware of the existence of these acts. Is he indeed ignorant that any amendments have been made, or knowing that they have, has he determined to set them at nought, and then allow his publishers to advertise this *Digest of Proofs in Criminal Proceedings* as brought down to Michaelmas Term in the year that has just expired?

But now leaving these, which may be called the graver faults of the publication before us, to their fate, we would take a hasty sketch of some of the “clumsy patchwork” to which we have before alluded. A good instance may be found at p. 157, vol. i.

It is there laid down as a general proposition, that “An inhabitant of a county or *other district*, upon which any

duty is thrown to which the witness is bound to contribute, *is not* competent to give evidence in discharge or alleviation of the burthen." The author then qualifies this rule by referring to many statutes, and among others to the 27 Geo. III. c. 29; the 54 Geo. III. c. 170; the 3 & 4 Will. III. c. 11; the 3 Geo. IV. c. 126; and 5 & 6 Will. IV. c. 50, which render inhabitants of parishes competent witnesses in certain specified cases. On these observations, which occupy four pages, we will make none, further than to state, what appears to be unknown to Mr. Starkie, that the cases of *Oxenden v. Palmer*, and *Rex v. Bishop Auckland*, which are cited at p. 159, and are there described, the one as questioning *Meredith v. Gilpin*, and the other as overruling *Rex v. Hayman*, have themselves in their turn been overruled in *Doe d. Boulton v. Adderley*, and *Doe d. Batchelor v. Bowles*, 8 Ad. & El. 502. With this remark we will pass to p. 161, where we find the following clause: "But now by the late statute 3 & 4 Vict. c. 26, s. 1, it is enacted, *sec. 1* (sic) that no person called as a witness on any trial shall be disabled from giving evidence by reason only of such person *being the inhabitant* (sic) of any parish or township rated or assessed, or liable to be rated or assessed (the words of the act are very different, 'by reason only of such person being, *as the inhabitant of any parish or township, rated,*' &c.) to the relief of the poor, or for or towards the maintenance of church, chapel, or highway, or for any other purpose whatever." And by s. 2, no churchwarden, overseer, or other officer in, and for any parish, township, or union, or any person rated or assessed, or liable to be rated or assessed as aforesaid, shall be disabled from giving evidence on any trial, appeal, or other proceeding, by reason only of his being a party thereto, or liable to costs in respect thereof, where he shall be only a nominal party to such trial, &c., and *shall only be liable to contribute to such costs in common with other ratepayers.*" Mr. Starkie takes no notice of the difficult question, how the words printed in italics would be construed with reference to the stat. 4 & 5 Will. IV. c. 76, s. 82, which renders overseers, in case an appeal be decided against them, *individually and primarily* liable for the costs, and also with reference to the case of the *Queen v. the Recorder of Bath*, 9 Ad. & Ell. 715, where Mr.

Justice Littledale observes, that "It might depend on circumstances whether the overseers would be allowed the costs in the cause." He also omits the important preamble of the act, which recites, that "it is expedient to remove all doubt whether persons are by law competent to give evidence in cases where they have been formerly held to be disqualified by the liability to pay parochial rates;" but in a little note we find the naïve confession, that "This statute has rendered many of the preceding observations (written before it was passed) unnecessary." We entirely concur with this statement, and we humbly ask why, though the unnecessary observations were *written* before the act passed, that is, before July, 1840, they should also be *printed and published* eighteen months afterwards. We make no comment on the following sentence taken from vol. iii. p. 798, except to remark, that here at least, though a note points to the statute 54 Geo. III. c. 170, s. 9, there is no mention made of the act of Victoria—"The inhabitants of contending parishes in settlement cases *are considered* sub modo as partners, and on this ground it has been held that an inhabitant of the adverse parish *is not* compellable to give evidence."

To take another instance.—At p. 97, vol. i. the incompetency of a witness on the ground of infamy is said to be thus removed: "1st. By proof that the party *has been admitted to his clergy, and undergone such punishment as is equivalent to clerical purgation at the common law*, or that he has undergone the sentence according to the late statutes. 2ndly. By proof of pardon. 3rdly. By proof of the reversal of the judgment."

Under the first head is introduced a discussion, (interesting, it may be, to some persons, but practically useful to none,) respecting benefit of clergy, burning of the hand, making purgation, and whipping; many curious statutes are cited, and then at p. 100, the observations on this head are closed by the following sentence: "By the stat. 9 Geo. 4, c. 32, s. 3, 4, the endurance of the punishment in all cases of *misdeemeanor*, except perjury or subornation of perjury, restores the competency of the offender." Still what is the present law as to *felonies*? The old black-letter acts puzzle us, and give no information. But there is a little note "(a) See also the

stat. 7 & 8 Geo. 4, c. 28, s. 13 ; 9 Geo. 4, c. 32, s. 3<sup>1</sup>; *infra*, 100, as to felonies." Why we are at page 100 now—what does "infra 100" mean? we will look at the acts. Well, here is section 13 of 7 & 8 Geo. 4, c. 28, which enacts that "Where the King's Majesty shall be pleased to extend his Royal Mercy to any Offender convicted of any Felony punishable with Death or otherwise, and by Warrant under His Royal Sign Manual, countersigned &c., shall grant to such Offender either a free or a conditional *Pardon*." Why that belongs to the next head, which treats "Of Pardon," and has nothing to do with the endurance of punishment. It is in vain to look further to the references ; we will read on : "Next it may be shown that the proposed witness has received a pardon for his offence, &c." At the end of this head, in the next page, we come upon the very law we wanted to find, for s. 3. of 9 Geo. 4, c. 32, is set out, which restores the competency of any offender who shall be convicted of any *felony* not punishable with death, and shall *endure the punishment* adjudged for the same ; s. 4, of the same act, which relates to *misdemeanors*, immediately follows, though it had already been noticed at page 100. Surely if law books had always been written in this form, George the Third would not have made his well-known remark, that the best lawyers in his kingdom seemed to know no more law than other people ; they only knew where to find it.

Again, under the head "Accomplice," vol. ii. p. 10, et seq. much obsolete law respecting approvers is mentioned, and allusion is made to many statutes, which a note declares to be repealed, and which every one knows to be so (*o*), p. 12. The really important subject, of how far and in what respects the evidence of an accomplice must be corroborated, is discussed in a note, and indeed with considerable ability, but not one word is to be found relating to the modern cases of *Rex v. Addis*, 6 C. & P. 388 ; *Rex v. Webb*, 6 C. & P. 595 ; *Rex v. Wilkes*, 7 C. & P. 272 ; *Rex v. Moores*, 7 C. & P. 270 ; *Reg. v. Farler*, 8 C. & P. 106 ; *Reg. v. Dyke*, 8 C. & P. 261 ; and *Reg. v. Birkett*, 8 C. & P. 732 ; which go to establish the sensible and just practice of requiring confirmation, not only

<sup>1</sup> It will be observed that a reference to the statute 9 G. 4, c. 32, s. 3, is appended as a note on the same statute, s. 3 & 4.

as to the circumstances of the crime, but as to the fact that the prisoner was a party to its commission.

If the instances cited above are sufficient to support the charge of writing in a patchwork style, those which follow will, we conceive, prove that our language was not too strong when we spoke of numberless omissions, errors and repetitions. At page 47, vol. ii. we find that "an apothecary by the stat. 55 Geo. 3, c. 194, s. 21, must, in an action for business done, prove either that he practised as an apothecary prior to or on the 1st day of August, 1815, or that he has duly obtained his certificate from the master, wardens and Society of Apothecaries." In the first place, that is not the law; for he may prove that before the 1st August, 1826, he held a commission or warrant as surgeon or assistant-surgeon in the royal navy, or as surgeon or assistant-surgeon or apothecary in her majesty's army, or as surgeon or assistant-surgeon in the service of the East India Company. See 6 Geo. 4, c. 133, s. 4, and *Steavenson v. Oliver*, 8 M. & Wels. 234. Then the sentence is obscure for not pointing out whether the qualification must be proved on non assumpsit, or need only be so, when specially denied; and lastly, even assuming that the former is implied, and waiving the objection founded on 6 Geo. 4, the correctness of the sentence would still be merely accidental, for it is certainly not proved by any of the cases cited in its support. Those cases, being decided before the New Rules, cannot govern the present practice. *Wagstaffe v. Sharpe*, 3 M. & Wels. 521; *Wills v. Langridge*, 5 Ad. & Ell. 383; *Shearwood v. Hay*, 5 Ad. & Ell. 383; *Morgan v. Ruddock*, 1 H. & W. 505, and 4 Dowl. 311, and *Cope v. Rowlands*, 2 M. & Wels. 149, are the authorities on this subject since the New Rules, and not one of these is mentioned by Mr. Starkie.

Turning to the next page, we find under the head "Apportionment" no reference either to the stat. of 11 Geo. 2, c. 19, or to the recent and important stat. of 4 & 5 W. 4, c. 22. Then comes the head "Appropriation—See Payment," which is immediately followed by "Appropriation of Payment—See Payment." This is a subtle division of heads, for which we were not prepared.

In the following page, a note informs us that maliciously to

set fire to any house &c. with intent to injure or defraud any person, is a *capital* offence. Then at p. 120, vol. ii., the head "Bank, Joint Stock" is thus laconically dismissed: "See stat. 7 Geo. 4. c. 36, and tit. Partners." The act here intended is chap. 46, and not 36, and no mention is made of the more recent acts on the same subject, namely, the 3 & 4 W. 4, c. 98; 1 & 2 Vict. c. 96, continued by 3 & 4 Vict. c. 111.

In like manner, under the head "Executors," vol. ii. p. 439, the author despatches in a note of five half-lines the important stat. 3 & 4 W. 4, c. 42, s. 2, which empowers executors to bring actions within certain periods for injuries to the real estate of the deceased, and renders them liable to actions of trespass for any wrongs committed by the testator during the last six months of his life. The following cases, among others that might be mentioned, are also wholly omitted. *Bloor v. Davies*, 7 M. & Wels. 235; *Green v. Salmon*, 8 Ad. & Ell. 348; *Brice v. Wilson*, 8 Ad. & Ell. 349; *Abercrombie v. Hickman*, 8 Ad. & Ell. 683; *Nowell v. Davies*, 5 B. & Ad. 368, and *Powell v. Rees*, 7 Ad. & Ell. 426.

Consider to what an extent a young practitioner may be misled by such writing as this (vol. ii. p. 449):

"Proof of the stamp on the probate is evidence of assets (*i*). But it is doubtful whether it be evidence as to the amount of assets (*k*).

"(*i*) *Foster v. Blakelock*, 5 B. & C. 328; 8 D. & R. 48. But it is evidence only of the smallest amount which the stamp would cover. *Curtis v. Hunt*, 1 C. & P. 180; *Duncan v. Hampton*, Sitt. after T. T. 1830.

(*k*) *Britton v. Jones*, 3 Bing. N. C. 676."

*Britton v. Jones* has nothing at all to do with the matter; and on turning to *Stearn v. Mills*, 4 B. & Ad. 657, and *Mann v. Lang*, 3 A. & E. 699, it appears that the probate is not evidence of the amount or receipt of assets, and that neither *Foster v. Blakelock* nor *Curtis v. Hunt* can any longer be regarded as a safe authority upon the point.

Under the head "Bribery," p. 271, vol. ii., no notice is taken either of the Treating Act, 7 W. 3, c. 4, or of the Election Bribery Act, 49 Geo. 3, c. 118, or of the act passed last June, empowering committees to receive evidence of bribery on the whole matter, before the fact of agency is established, or of the important cases of *Henslow v. Fawsett*, 3 Ad. & Ell. 51; *Wade v. Broughton*, 2 Ves. & Bea. 173; *Bremridge v. Camp*.

bell, 5 C. & P. 186; Bayntun v. Lattle, 1 Moo. & Rob. 265, or Webb v. Smith, 4 Bing. N. C. 373; neither is any reference made to the penalties incurred by bribing or attempting to bribe voters in the election of officers under the Municipal Corporation Act, nor to the case of Harding v. Stokes, 1 Mee. & Wels. 354, where it was held that a promise to give employment was a "reward" within the meaning of the 54th section of that act.

Under the head "Gaming," vol. ii. p. 507, we looked in vain for the statute 5 & 6 W. 4, c. 41, s. 1, which makes securities, given for gaming debts, valid in the hands of innocent indorsees for value. Under the head "Bill of Exchange, Illegality," vol. ii. p. 245, brief reference is made to the act in a note, but in the very next page the statute 9 Ann. c. 14, s. 1, rendering such securities absolutely void, is mentioned in the text as the existing law.

Under the head "Usury," vol. iii. p. 1185, the statute of Anne, making usurious assurances void, is set out; but the act of 5 & 6 W. 4, c. 41, s. 1, which enacts that such assurances shall not be void, but only considered as given for an illegal consideration, is omitted. The same inaccuracy is repeated at p. 246, vol. ii. In that page we also find that "by 2 & 3 Vict. c. 37, bills and notes at less than 12 months date, above 10*l*., are not to be affected by the usury laws;" and this is repeated, with amplification, at p. 1188. We might observe, did it not savour of ingratitude to find fault with the quotation of any act passed in the reign of her present majesty, where so few of that date are mentioned, that the statute cited was one of limited duration, and would have expired on the first day of the present year, had it not been continued for another year by 3 & 4 Vict. c. 83, and again to 1st Jan. 1844, by 4 & 5 Vict. c. 54.

We will give in detail but one more specimen, which shall be taken from the first volume. At p. 470 we find the following clause: "As natural persons, as well as aggregate corporate bodies, must be described by name, an allegation of the name of any such person or body, whose existence is essential to the *claim* or *charge*, is necessarily descriptive, and consequently a variance is generally *fatal*. When, however, the name of a party to the *action* or *indictment* is mistaken, the objection must be taken by *plea of the misnomer in abate-*



*ment*, and cannot be taken by a plea in bar." Now, we would draw the attention of the reader to the words printed in italics, for we believe that no eight lines were ever printed containing a greater complication of errors than those before us. For not to refer again to the late amendment act, empowering the judge to amend the record, where any variance shall exist between it and the proof respecting any *name* or other matter not material to the merits—not again to allude to the cases which establish that the power of amendment given by this act should be *liberally exercised*—we may here remind the reader, that, first, where the name of a party to the *action* is mistaken, the objection *cannot* be taken by a plea in abatement, such plea being now abolished, and the declaration being amendable at the plaintiff's cost, upon a judge's summons founded on an affidavit of the right name;<sup>1</sup> secondly, where the name of a party to an *indictment* is mistaken, if that party be the *prosecutor*—for we presume the author, in speaking of the party to the indictment, does not mean the *Queen*—the defendant must be acquitted, and if he be the defendant, the plea of abatement, though not absolutely taken away, is now rendered wholly useless, 7 Geo. 4, c. 64, s. 19; yet inaccurate as this clause is shown to be, we find part of it again inserted at p. 471, and the remainder repeated, with no apparent object, except it be to establish the error, at p. 473.

In addition to the instances given above, we find at p. 76, vol. i., that "the law (as distinguished from statute law) raises a presumption of title on an undisputed possession of land for twenty years;" at p. 281, vol. ii., that burglary is breaking and entering a house "where there is not sufficient *daylight* for discerning the face of a man;" at p. 738, vol. iii., that the stat. 50 Geo. 3, c. 48, s. 7, is the act which at present regulates stage-coaches; and at p. 496, vol. i., that the case of *Pullen v. Seymour* is repeated twice in one page. We do *not* find any of the following titles in the alphabetical list of important matters contained in the second and third volumes:—Fixtures, Register, Railways, Companies, Clubs, Robbery, Affirmation, Quakers, Oath, Pound Breach, Post Office, Embezzlement, Smuggling. Under the title "Game," we find none of the modern acts relating to poaching; under the title

<sup>1</sup> 3 & 4 W. 4, c. 42, s. 11.

“Assault,” only three statutes relating to aggravated assaults, and those either repealed or become obsolete; and under the title “Bastardy,” no notice either of the stat. 4 & 5 Will. 4, c. 76, providing that the evidence of the mother respecting the father of the child must be corroborated in some material particular by other testimony, or of the stat. 2 & 3 Vict. c. 85, which regulates the present practice in making orders of affiliation. We therefore ask with confidence, whether these samples, taken as they are at hazard from the work before us, are not sufficient to enable any man to form a pretty accurate estimate of the remainder; and if that be so, we would further ask, if they do not effectually illustrate the proposition with which we started, “that a work more negligently executed has seldom been presented to the notice of the profession.”

Had the author been unknown in Westminster Hall, we should have made no remarks upon his work, but have simply left it to enjoy a dusty repose by the side of some antiquated Burn's Justice in a book-stall in Bell Yard; but the case is widely different when the author is a gentleman so eminent as Mr. Starkie. Such a man must know that many young members of the profession will purchase his work, in the confident expectation that it will do credit to the reputation he has already gained. Unable to judge correctly of its merits for themselves, they can only rely on the character of the author, and we cannot therefore think that it is *quite* fair towards them, that a book so inaccurate as the one before us should be published with the sanction and support of such a name. We do not think it is fair; we are sure that, in the long run at least, it is not prudent; for, although some copies may thus be sold at first to disappoint and mislead their purchasers, yet when the defects are detected—and detected such defects ever will be sooner or later—there is an end of the sale of the edition; and in these days of literary as of all other competition, with Americans<sup>1</sup> as well as Englishmen in the field, it can scarcely be supposed that any lawyer will be found to spend four guineas and a half in purchasing what, if relied upon in its present state,

<sup>1</sup> An English reprint of Mr. Greenleaf's work, which enjoys a high reputation, has been announced.

would prove worse than useless. We have spoken of its "present state" designedly; for the publishers inform us that "an addenda, index of matter, and names of cases will be ready early in this year." We hope not *very early*, for we would suggest that a corrigenda should be added, and that the author should have time to make ample corrections and additions. Let the most inaccurate pages be boldly cancelled, and their contents carefully remodelled. We are aware that this cannot be done "off hand;" but it *must* be done, or the edition will never be sold off. If Mr. Starkie has not himself leisure for the undertaking, surely, in a crowded profession, he might with ease find some friend to assist him. We know many a laborious and sound lawyer who would gladly be employed in such a task, and would work with a will—*Gaudia laturus meritorum præmia*.

*J. P. T.*

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## DIGEST OF CASES.

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### COMMON LAW.

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[Comprising 11 Adolphus & Ellis, Part 5; 1 Gale & Davison, Parts 2 and 3; 1 Manning & Granger, Part 5; 2 Manning & Granger, Part 1; 2 Scott's New Reports, Parts 2, 3, and 4; 8 Meeson & Welsby, Parts 2 and 3; and 9 Dowling's Practice Cases, Parts 5 and 6:—all cases included in former Digests being omitted.]

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#### ACCOUNT STATED.

In an action against H. and C., who acted as trustees in the administration of an insolvent's estate, for a debt contracted by them as such with the plaintiffs, it was proved that H. called at the plaintiff's counting house, and was shown the account in the ledger by their clerk; that he objected to one or two items, but said nothing as to the others; and that he promised to send corn from the estate for the balance; that H. and C. were several times together at the counting-house; that the amount of the debt was mentioned without being objected to, at a meeting of the creditors at which both were present, and that C. had by letter admitted that there was a debt due to the plaintiffs: Held, sufficient evidence of an account stated by H., and that the jury were warranted in inferring from the circumstances that he had authority to bind C.—*Chisman v. Count*, 2 Scott, N. R. 569.

#### ADVOWSON.

(*Sale of advowson of perpetual curacy, under 5 & 6 Will. 4, c. 76, s. 139.*) The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 139, enacts that where any body corporate is seised, in its corporate capacity, of any manors, lands, or tenements, whereunto any advowson, or right of nomination or presentation to any benefice or ecclesiastical preferment, is appendant or appurtenant, or any advowson in gross, or has any right or title to nominate or present to any benefice or ecclesiastical preferment, every such advowson and every such right of nomination and presentation shall be sold, as the ecclesiastical commissioners may direct; with a proviso, "that in any case of vacancy arising before any such sale shall have taken place and been completed, such vacancy shall be supplied by the presentation or nomination of the bishop or ordinary of the diocese in which such benefice or ecclesiastical preferment is situated."

The 1 & 2 Vict. c. 31, s. 1, after reciting the above clause, and also reciting

that in some instances the manors, lands, &c. whereof some municipal corporations are seised, were granted to them with an obligation to nominate, provide and sustain in certain churches or chapels, able and fit priests, curates, preachers or ministers, for the performance and administration of ecclesiastical duties and rites therein, and for the cure of the souls of the parishioners and inhabitants of the parishes or places thereunto belonging; and although such corporation had from time to time duly nominated and provided such priests, &c. and provided stipends for their sustenance, and had either provided houses for their residence or made allowances in lieu thereof, yet such stipends and allowances had not been fixed or assured by any competent authority, and for want of any regular endowment or augmentation of such curacies, they had not become perpetual cures or benefices presentative, and the curates had not become bodies politic and corporate within the meaning of the 1 Geo. 1, c. 10, s. 4, and 36 Geo. 3, c. 83, s. 3, by reason whereof doubts had arisen, whether the right of nominating ministers to such churches and chapels could be sold under the provisions of the 5 & 6 Will. 4, c. 76, s. 139; and that it is expedient that such doubts should be removed; enacts, that every right of nomination of every such priest, curate, preacher or minister, which at the time of the passing of the 5 & 6 Will. 4, c. 76, was vested in any municipal corporation, &c. shall and may be sold as the commissioners may direct, and shall become vested in the purchaser thereof, his heirs and assigns; and that from and after such sale and assurance, every such curacy, preachership or ministry shall become a benefice presentative within 36 Geo. 3, c. 83, s. 3, and every such curate, &c. a body politic and corporate within the meaning of the 1 Geo. 1, c. 10, s. 4, &c. and every such purchaser, his heirs and assigns, may present to such benefice from time to time, when the same shall become vacant, &c.

By a charter of the 6th of James 1, the tithes, &c. within the lordship of Bury St. Edmund's, were granted (subject to a then existing lease thereof for forty years) to the aldermen and burgesses of that town, who agreed, after the expiration of the said lease, to pay 8*l.* 10*s.* for the tithe and glebe lands yearly, to the curate and ministers of the parish churches of St. Mary and St. James, in Bury St. Edmund's aforesaid. By another charter of the 12 James 1, reciting that he expected the aldermen and burgesses of Bury aforesaid would provide and sustain approved, able, and fit ministers and preachers of the word, and other officers in the churches aforesaid, necessary at all times to come; the king granted to them and their successors the whole and entire rectories and vicarages of Bury St. Edmund's, and of the aforesaid parish churches, and the advowsons and donations, free dispositions and rights of patronage of the same churches, and all manner of tithes, &c.

The corporation made no endowment, and gave no fixed stipend to the ministers of either of the said churches, but subsequently, in the year 1687, appointed two clergymen to each church, the one called a preacher or lecturer, and the other a curate or reader; the former being paid by a salary from the corporation, varying from 100*l.* to 80*l.* a year, and the latter, since the year 1712, deriving his only remuneration from the surplice fees and Easter offerings.

The office of curate or reader of the parish of St. James having become vacated before any sale had been effected by the corporation: Held, that it was unnecessary to consider whether the right of presentation or nomination to that office was within 5 & 6 Will. 4, c. 76, s. 139, inasmuch as it clearly fell within the provisions of the 1 & 2 Vict. c. 31; that the necessary consequence

of holding it to be within the latter statute, was to bring it within the proviso of the 139th section of the former act; and consequently that such right of presentation or nomination vested in the bishop of the diocese.—*Hine v. Reynolds*, 1 Man. & G. 71; 2 Scott, N. R. 394.

#### AFFIDAVIT.

1. (*Scandal and impertinence.*) The Court will refer affidavits to the master for scandal and impertinence.—*Balls v. Smythe*, 2 Scott, N. R. 495.
2. (*Jurat—Judge's signature.*) Where an affidavit was sworn in the usual way at a judge's chambers, but through mistake was not laid before the judge, and therefore the jurat was not signed by him, it was held irregular, and an order obtained upon such affidavit for a *capias*, and all the proceedings thereon, were set aside; although after some days (but after the execution of the *capias*), the affidavit was laid before the judge, and signed by him.—*Bill v. Bament*, 8 M. & W. 317; 9 D. P. C. 810.
3. (*Stamping.*) Affidavits used in answer to an application to set aside an award made under a submission by deed, must be stamped, notwithstanding the stat. 5 Geo. 4, c. 41. (But see now the 4 & 5 Vict. c. 34, s. 1.)—*In re Templeman and Reed*, 9 D. P. C. 962.
4. (*Taking office copies of.*) Where a counsel, on appearing to show cause against a rule, is not prepared with office copies of the affidavits on which the rule was obtained, it is matter of discretion with the Court whether time shall be allowed for taking office copies.—*In re Rogers*, 9 D. P. C. 926.

And see ATTORNEY, 5; HUSBAND AND WIFE, 2.

#### APOTHECARIES' ACT.

1. A chemist and druggist practising as an apothecary in attending the sick and giving them medicines for reward, is liable to penalties under the statute 55 Geo. 3, c. 194.—*Apothecaries' Company v. Greenough*, 1 G. & D. 378.
2. Debt for work done as an apothecary: plea, that the plaintiff was not an apothecary prior to the 1st of August, 1815, nor had at any time obtained a certificate to practise as an apothecary from the master, wardens, and society of the art and mystery of apothecaries: replication, that before the work was done, and before the 1st of August, 1826, to wit, on &c., the plaintiff held a warrant as assistant-surgeon in the navy, bearing date &c., and that the work was done after the passing of the 6 Geo. 4, c. 133: Held, on special demurrer, that the replication was good.

Held also, on objection to the plea, that the certificate required by the 55 Geo. 3, c. 194, was a certificate from the Court of Examiners, and not from the master, wardens, and society of the art and mystery of apothecaries, that the plea was good.

By the 6 Geo. 4, c. 133, s. 4, it is provided that every person who held, or thereafter should hold, a commission or warrant as surgeon or assistant-surgeon in his majesty's navy or army, should be entitled to practise as an apothecary in any part of England or Wales, without having undergone the examination or received the certificate required by the 55 Geo. 3. By the 11th section, the act was to continue until the 1st of August, 1826: Held, that those persons who held warrants prior to the 1st of August, 1826, and who were therefore entitled to practise as apothecaries, were not deprived of that right by the expiration of the act.—*Steavenson v. Oliver*, 8 M. & W. 234.

**APPEAL.** See **BEER ACT**; **HIGHWAY**, 1; **LUNATIC**; **SESSIONS**.

### **ARBITRATION.**

1. (*Revocation of submission by bankruptcy—Taxation of costs on award.*) In a submission to arbitration by an order of nisi prius, in an action between A. and B., it was stipulated that a certain sum of money should be placed by B. in the hands of C., the arbitrator, to abide the event of the award. B., after placing the sum in the hands of C., becomes bankrupt. The submission is not revoked; nor are the assignees of B. entitled to demand back the money. Under such circumstances, C. has not a mere authority, but an authority coupled with interest.

Upon the reference of a cause and all matters in difference, though the arbitrator finds no damages, and orders no damages to be entered, the costs may be taxed upon the award.—*Tayler v. Marling*, 2 Man. & G. 55; 2 Scott, N. R. 375.

2. (*Award—Excess of authority by arbitrator.*) In an action of replevin against husband and wife, in respect of a distress made for 50*l.*, 2½ years' arrears of an annuity devised to the wife, the cause and "all matters relating to the annuity in question" were referred to arbitration. The arbitrator, by his award, directed the payment of the 50*l.*, and of a further sum of 40*l.* for arrears of the annuity accrued due since the action brought: Held good; for that the terms of the order of reference included not only the subject-matter of the action, but all matters relating to the annuity to which the action had reference.

The arbitrator directed these sums to be paid to the wife: Held, that the award was not therefore bad.—*Wynne v. Wynne*, 9 D. P. C. 901.

3. (*Umpirage.*) A cause and all matters in difference were referred to the award of A. and B., and such third person as they should appoint in case of difference, or of a majority of them. A difference having arisen between A. and B., a statement was made by each of them to the third, as to what he thought the award ought to be. An award was afterwards made by the umpire and A., without any further meeting. The Court set it aside.—*In re Templeman and Reed*, 9 D. P. C. 962.

4. (*Award—Excess of authority by arbitrator.*) An arbitrator, on a reference as to the right to a certain house and premises, by his award directed that certain conveyances should be executed by the one party to the other, and awarded that in case of any disputes as to the form of such conveyances, they should be settled by such solicitor or counsel as he should appoint: Held, that such reservation of future power to himself, was an excess of authority in the arbitrator; that that direction could not be separated from the rest of the award, and therefore that it was bad in toto.—*In re Taudy and Taudy*, 9 D. P. C. 1044.

5. (*Award—Finding on several issues.*) Where a cause is referred, in which several issues are raised on the pleadings, the arbitrator is bound to find expressly on each, although he is not requested by the parties to do so. Therefore, in an action in which there were issues on several pleas, and the arbitrator awarded merely that the plaintiffs had no cause of action, and directed the verdict to be entered for the defendant, the award was held bad. (5 B. & Ad. 403; 10 Bing. 568; 4 M. & W. 432; 5 M. & W. 50.)—*England v. Davison*, 9 D. P. C. 1052.

And see **AFFIDAVIT**, 3; **ATTACHMENT**, 2.



**ARREST.**

(*Privilege of barrister from.*) A barrister who has been actually engaged at petty sessions, but without *previous retainer*, for a defendant in a case of summary conviction, where counsel are allowed by 6 & 7 Will. 4, c. 114, is not privileged from arrest *redeundo*. (2 B. & Adol. 663; 1 H. Bl. 636; 1 C. & M. 579.)—*Newton v. Constable*, 1 G. & D. 408; 9 D. P. C. 933.

**ATTACHMENT.**

1. (*Not grantable on last day of term.*) A rule nisi for an attachment against an attorney, for nondelivery of a bill of costs pursuant to a judge's order, cannot be granted on the last day of term. Nor will the Court grant the rule to show cause at chambers, inasmuch as the attachment can only issue by the order of the Court.—*Ashmore v. Rypley*, 2 Scott, N. R. 203.
2. (*For nonpayment of costs under award.*) A rule absolute for an attachment for nonpayment of the costs of a cause, and of an award made in that cause, will not be granted in the first instance, though the reference be of the cause only.—*Daniell v. Beadle*, 1 Man. & G. 960; 2 Scott, N. R. 155.
3. Where a rule of Court, in an action of ejectment, required possession of certain premises to be delivered up, but did not say by whom, the Court refused to make absolute a rule for an attachment against the tenant in possession for not delivering them up: and as he was a stranger to the ejectment, refused also to grant a rule requiring him to deliver up possession.—*Doe d. Lewis v. Ellis*, 9 D. P. C. 944.
4. (*Affidavit in support of.*) On an application for an attachment for nonpayment of money pursuant to an award, the affidavit of the money being still due may be made by the attorney, where it has been demanded by him under a letter of attorney.—*Reg. v. Paget*, 9 D. P. C. 946.
5. (*Service on partners.*) Where one of two partners, attorneys in the country, directed that a particular rule of Court should be served on their agent in London, such service was held not to be sufficient to bring the other partner into contempt, although it was sufficient as to the party who gave the order.—*In re Holiday*, 9 D. P. C. 1020.

**ATTORNEY.**

1. (*Summary jurisdiction over.*) Where an attorney has received, in his character of *steward*, money from his client, the Court will not summarily compel him to refund it, although it be stated to have been improperly received.—*Ex parte Faith*, 9 D. P. C. 973.
2. (*Attorney and agent—Certificate.*) Where an attorney, being off the roll in consequence of not having taken out his certificate, employed his agent to sue out process, and costs were paid in the action to the agent, the Court refused to compel either the attorney or the agent to refund them.—*Nash v. Goode*, 9 D. P. C. 929.
3. (*Undertaking by.*) Where an attorney undertook to pay the sum which should be awarded to be paid by his client on a reference, in which the arbitrator was to make his award by a day named, but did not do so, and the time was enlarged by consent by a judge's order, the Court held the attorney thenceforth discharged from his undertaking.—*Staite v. Haddon*, 9 D. P. C. 995.

4. (*Re-admission.*) The Court will not re-admit an attorney who has been convicted of a conspiracy to extort money by the publication of libels.—*In re Hawdon*, 9 D. P. C. 970.
5. (*Striking off roll—Affidavit—Stamp.*) An affidavit in support of an application by an attorney to be struck off the rolls, must be stamped.—*Ex parte Watkin*, 9 D. P. C. 974.

#### BAIL.

- (*Proceedings against defendant after proceeding on bail-bond.*) Although the plaintiff has proceeded against the bail upon a bail-bond, given under the 1 & 2 Vict. c. 110, s. 4, he may also proceed against the defendant in the original action.—*Betts v. Smyth*, 1 G. & D. 284.

#### BANKER.

- (*Lien of.*) A. in South America makes remittances to B., a merchant in London, directing B. to invest the amount in exchequer bills, and to hold such exchequer bills, when purchased, on A.'s account. B. purchases the exchequer bills in his own name, and deposits them in a box which he keeps locked at his bankers. When interest becomes due and the bills are to be exchanged for new ones, B. delivers the bills to the bankers for that purpose; which being effected, B.'s account with the banker is credited with the interest, and in about a week or two B. receives the new exchequer bills, and places them in the box. The bills are not entered in B.'s pass book, nor are they noticed in the bankers' books. After one of these exchanges of exchequer bills, and before the new bills are received by B. from the bankers, or placed in the tin-box, B. overdraws his banking account. The bankers have no notice that these bills belong to A., or that they are not the property of B.: Held, that the bankers have no lien upon the exchequer bills for the balance of B.'s banking account.

Whether the bankers would have had a lien upon the exchequer bills, supposing them to have been the property of B., *quære?*—*Brandao v. Barnett*, 1 Man. & G. 908; 2 Scott, N. R. 96.

#### BANKRUPTCY.

1. (*Right of, to set aside execution.*) The interest which a bankrupt has in increasing the divisible fund under the fiat is sufficient to entitle him to set aside an execution levied on his goods against good faith.—*Pinches v. Harvey*, 1 G. & D. 236.
2. (*Certificate, when a bar to action.*) The defendant, against whom a fiat of bankruptcy issued on the 19th April, 1839, and who obtained his certificate on the 6th August, 1839, gave the following undertaking to the plaintiff on the 17th November, 1838:—"In consideration of your discharging B. out of custody (who had been taken under a ca. sa. at the suit of the plaintiff,) I undertake he shall pay the debt due to you by four half yearly instalments, the first to be paid on the 17th May, 1839." On this B. was discharged. Held, that the certificate of the bankrupt was a bar to an action for the two first instalments, because B. having been discharged from the debt, this was an original undertaking on his part to pay by the hand of B. (1 B. & Ald. 29.)—*Lane v. Burghart*, 1 G. & D. 311.
3. (*Reputed ownership.*) Whether a trader was, at the time of his bankruptcy, the reputed owner of particular property, is a question of fact, depending upon a consideration of all the circumstances attending the possession of such property.

Where, therefore, in trover by the assignees of A., a bankrupt, for a policy of insurance, the defendants pleaded, not guilty, and that the plaintiffs were not possessed as assignees; and at the trial it appeared,—that in 1836 the policy had been deposited by A. with the defendants, as a security for an advance of money; that in March, 1837, A. became embarrassed, and a meeting was called of his creditors, at which a list of his debts was read aloud and handed round the room, which list contained a statement that the policy in question was deposited with the defendants as a security for 3000*l.*, from which sum 1200*l.*, the estimated value of the policy, was deducted, leaving the defendants creditors for the balance, 1800*l.*; that on the 15th July, 1837, (the fiat being granted on the 27th,) an agent of the defendants called at the insurance office, and asked if the premium on the policy had been paid, at the same time stating that the policy had been deposited with the defendants; that the insurance company kept a book for the purpose of entering *written* notices of assignments and deposits of policies, which book contained no such entry with respect to the policy in question; and that the insurance office paid no regard to a verbal notice: it was held, that a direction, that the defendants had not got rid of the apparent ownership of A., by what passed at the meeting of the creditors, and by the conversation at the office, not followed up by a notice *in writing*,—was wrong; it being a question for the jury, whether, under those circumstances, A. was the reputed owner of the policy at the time of his bankruptcy.—*Edwards v. Scott*, 1 Man. & G. 962; 2 Scott, N. R. 266.

4. (*Irish bankruptcy—Competency of bankrupt as witness for assignees.*) Under the Irish Bankrupt Act, 6 & 7 Will. 4, c. 14, the right of suing in an English court upon a contract made by the bankrupts in England with a person resident in England, passes to the assignees under an Irish commission of bankrupt.

A trader who has obtained his certificate under a commission of bankrupt issued against him in Ireland, under the provisions of 6 & 7 Will. 4, c. 14, is a competent witness to support an action brought in England by his assignees, for a debt alleged to have been due to him before his bankruptcy.

So also, to negative a set-off upon a debt alleged to have been due from the witness to the defendant before the witness became bankrupt. (1 Hudson & Brooke, 114, 484.)—*Ferguson v. Spencer*, 1 Man. & G. 987; 2 Scott, N. R. 229.

5. (*Mutual credit.*) Assumpsit by the assignees of a bankrupt for goods sold and delivered by the bankrupt, with counts for money paid, had and received, and on an account stated. The defendant pleaded by way of set-off, that before notice of any act of bankruptcy, and before the issuing of the fiat, and before action brought, the defendant gave credit to the bankrupt, by accepting certain bills of exchange for his accommodation, and at his request, without any consideration or value, which said bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit; that the credits so given were likely to end in debts from the bankrupt to the defendant; and that afterwards, and before the commencement of the action, the defendant paid the said bills:—Held, a good set-off under the 6 Geo. 4, c. 16, s. 50, on the ground that mutual credit was shown: Held, also, that the assignees could not reply a fraudulent delivery of the goods.—*Russell v. Bell*, 8 M. & W. 277.
6. (*What right of action passes to assignees.*) Assumpsit by the assignees of T. H., a bankrupt. The declaration stated that T. H., before he became bankrupt, at the request of the defendant, bargained for and agreed to buy from the defend-

ant 2000 quarters skreened Odessa linseed, at the rate of 30s. 10d. per quarter, free on board at Odessa, the shipment to be made on board the buyer's vessel, on arrival at Odessa, which vessel was to be forthwith chartered for thence, and the amount of invoice was to be paid on handing over the same and the bill of lading to the buyers in London, in ready money, less two and a half per cent. discount. The declaration then averred that T. H. did, after the making of the promise and before his bankruptcy, forthwith dispatch a vessel to Odessa, chartered by him, which vessel arrived at Odessa within a reasonable time; that the vessel arrived at Odessa after the bankruptcy of T. H., and within a reasonable time after such arrival was ready and willing to receive the linseed on board, and that one N. H., the master of the vessel, was ready and willing to deliver to the defendant bills of lading for the linseed, of which the defendant had notice, and was requested by the said N. H., the agent of the plaintiffs in that behalf, to deliver the linseed on board the vessel; that the defendant refused to deliver the linseed on board, or any part thereof, by reason whereof the plaintiffs, as assignees of T. H., had sustained damage. The declaration then went on to allege that, although the defendant had notice of the bankruptcy, and that the plaintiffs being duly appointed his assignees, were, within a reasonable time, ready and willing, and then tendered and offered to pay for the linseed, and then requested the defendant to hand over to them bills of lading for the linseed in London, or to deliver the linseed to their assignees in London, yet the defendant wholly refused so to do.

Plea, that the plaintiffs did not, within a reasonable time after the bankruptcy of T. H. and the arrival of the vessel at Odessa, give notice to the defendant of their intention to adopt the contract for the purchase of the linseed, and to abide by the terms thereof:—

Held, on special demurrer to the plea, (per Parke, B., Gurney, B., and Rolfe B., Lord Abinger, C. B., dissentiente,)

1st. That the declaration disclosed a good cause of action, and that the plaintiffs were entitled to recover.

2ndly. That the matter contained in the plea formed no answer to the action. — *Gibson v. Carruthers*, 8 M. & W. 321.

7. (*Operation of 2 & 3 Vict. c. 29.*) Where an execution by fieri facias on a judgment on a warrant of attorney (not given by way of fraudulent preference) was executed by seizure after a secret act of bankruptcy, but not completed by sale of the goods seized before the issuing of the fiat, which was subsequent to the passing of the 2 & 3 Vict. c. 29: Held, that the execution creditor was not entitled to the benefit of it, as against the assignees of the bankrupt; the statute 2 & 3 Vict. c. 29, not having had the effect of rendering valid such executions, so as to entitle the execution plaintiff to the benefit of them as against the assignees, nor repealed the 108th sect. of 6 Geo. 4, c. 16.—*Whitmore v. Robertson*, 8 M. & W. 463.

8. (*Date and issuing of fiat, what is.*) The "date and issuing" of a fiat, within the statute 2 & 3 Vict. c. 29, is the time of delivering it out as an operative instrument; and *prima facie*, the time of delivering it out at the Bankrupt Office is that time.—*Pewtress v. Annan*, 9 D P. C. 823.

9. (*Feigned issue, construction of—Notice to dispute bankruptcy—Trading—Money scrivener.*) A feigned issue under the Interpleader Act, directing the following questions to be tried between the assignees of a bankrupt, and the execution creditors, at whose suit certain goods of the bankrupt had been seized, viz. "If

at the time of the seizing and levying of the said goods, &c. the plaintiffs were entitled to the same as against and free from the said execution; and if the said goods, &c. were not subject to be so seized and levied under the said writ as against the plaintiffs:" Held, that that issue raised the question, not only as to notice of the act of bankruptcy, but as to the plaintiff's title as assignees.

The 90th section of 6 Geo. 4, c. 16, requiring that, in any action by any assignee acting under a commission of bankrupt, notice shall be given of those matters connected with the commission which are intended to be disputed by the defendant, does not apply to such an issue.

Where the trading sought to be proved was that of a money scrivener, under the second section of the 6 Geo. 4, c. 16, which includes persons using the trade or profession of a scrivener, "receiving other men's monies or estates into his trust or custody," it was held, that the words of the act were not supported by proof that the bankrupt had negotiated loans, and had received procuration money for doing so, the money lent not being deposited in his hands; and that in one instance, he had been employed to call in money which was out upon mortgage, which money he received and retained in his possession, but for which he paid interest down to the time of the bankruptcy.—*Lott v. Melville*, 9 D. P. C. 882.

And see ARBITRATION, 1.

BARRISTER. See ARREST.

BASTARDY.

(*Order of bastardy, made by division of Poor Law Union.*) A poor law union consists of several places, over which several divisions of justices have jurisdiction. Quære, whether an order in bastardy can be made by one division, where the child has become chargeable in another. And the Court refused a mandamus to compel the justices of the former division to make such order.—*Ex parte Guardians of Wallingford Union*, 9 D. P. C. 987.

BEER ACT.

(*Appeal to county sessions under.*) Under 9 Geo. 4, c. 61, s. 27, an appeal lies to the quarter sessions of the county against the refusal of borough justices to grant a licence to sell beer, &c. although the borough has a charter with a ne intromittant clause, and has also separate quarter sessions under 5 & 6 Will. 4, c. 76, s. 103.—*Reg. v. Deane*, 1 G. & D. 292.

BILLS AND NOTES.

1. (*Plea to part of consideration.*) In debt by the drawer and payee of a bill of exchange for 25*l.* 10*s.* 3*d.* drawn in November "for value received to Michaelmas last," the defendant pleaded that before the acceptance, he held a messuage, &c. as tenant to the plaintiff, at a certain rent, and that the bill was drawn and accepted in payment by anticipation, amongst other considerations, of 12*l.* 10*s.*, part of the said rent not then due, and that before the drawing and acceptance of the bill, the plaintiff assigned the messuage to J. S. of which the defendant had not notice until after such drawing and acceptance; that after the bill became due, and before the commencement of the suit, J. S. gave notice to the defendant of the assignment, and required and received the 12*l.* 10*s.* from him, and that therefore the consideration of the acceptance, as respected the 12*l.* 10*s.*, wholly failed.

Held, (after the plaintiff had pleaded over, viz. upon demurrer to the replication,) that the plea was bad, on the ground that it answered only part of the

consideration, though pleaded to the count on the bill generally, and that fraud (which was not alleged) was not necessarily to be inferred from the statement in the plea.—*Clark v. Lazarus*, 2 Man. & G. 167 ; 2 Scott, N. R. 391.

2. (*Payment of bill by acceptor, what is.*) The holder of a bill of exchange placed it in the hands of a friend, with directions to present it. The latter got it discounted, and in order to regain possession of it, paid the amount to the bankers of the acceptor on the day it became due: Held, that this evidence negatived a plea of payment by the acceptor.—*Deacon v. Stodhart*, 2 Scott, N. R. 557.

3. (*Notice of dishonour—Averment of presentment.*) A bill of exchange, drawn by the defendant, was indorsed by him to the plaintiffs, S. & Co., who carried on business in partnership at Smethwick, four miles from Birmingham; by them to the Birmingham and Midland Counties' Bank, and by them to W. It became due on the 17th of August, and was dishonoured. On the 18th W. returned it to the bank at Birmingham, who received it on the 19th. The plaintiff S. had previously given directions at the bank, that all communications for his firm should be made to him at Tremadoc, in Carnarvonshire (in which neighbourhood he was engaged in mining concerns). The bank accordingly, on the 20th of August, sent notice of dishonour by post to S. at Tremadoc, which he received there on the 21st; and by the post of the 22nd he sent notice to the defendant: Held, that the notice to S., and therefore that to the defendant, was duly given.

A declaration by indorsee against drawer of a bill of exchange, accepted payable at the Bloomsbury branch of the London and Westminster Bank, stated that the bill was presented "at the said Bloomsbury branch of the London and Westminster Bank on the day when it became due." The defendant having sued out a writ of error, on the ground that the declaration did not sufficiently state a presentment to the acceptor, the Court gave the plaintiffs leave to issue execution notwithstanding the writ of error.

The defendant having thereupon abandoned the writ of error, the Court refused afterwards to give the plaintiffs the costs of the above application.—*Shelton v. Braithwaite*, 8 M. & W. 252.

4. (*Debt, when maintainable on.*) Debt is not maintainable by the indorsee against the acceptor of a bill of exchange.—(4 Rep. 91 ; 2 Bos. & P. 78 ; 9 D. P. C. 242, 893.)

And see PLEADING, 1, 5, 6, 7, 15, 16.

## BOND.

- (*Construction of.*) In an action on a bond conditioned for the honest and faithful service of a banker's clerk, and for his well and faithfully accounting for all monies, &c. which should come to his hands, the breaches assigned were, general misconduct, irregular and unbusinesslike conduct, and not faithfully accounting. The cause was referred to an arbitrator, who found specially that on a certain day, the clerk made an erroneous balance-sheet, failing to exhibit, as it ought to have done, a surplus of 100*l.*, but that it was not proved that that sum came to his hands; and also that, on a certain other day, the clerk, having received from a customer a sum of 213*l.*, entered it in the books of the bank 113*l.*, thus exhibiting on that day's balance-sheet a false and unaccounted surplus of 100*l.*: Held, that these facts did not entitle the plaintiffs to recover.—*Jephson v. Hawkins*, 2 Scott, N. R. 605.

**BOUNDARY ACT.** See **COMMON.**

**CANAL ACT.**

(*Construction of.*) An incorporated company is authorized by act of parliament to make a navigable canal, the construction of which will interfere with an ancient drain. By one section of the statute the company is required to make a drain on each side of the canal, and parallel therewith, in lieu of part of the ancient drain which will be destroyed. By another section the company is required to make such arches, tunnels, culverts, drains, or other passages over, under, by the side of, or into the canal, and the trenches, streams, and water-courses communicating therewith, and the towing paths on the sides thereof, of such depth, breadth, and dimensions as shall be sufficient to convey the water clear from the lands adjoining or lying near the canal, without obstructing or impounding the same, and to support, maintain, cleanse, and keep in repair, all such arches, tunnels, culverts, drains, and other passages.

Held, that the drains made in pursuance of the former section, in lieu of the ancient drain, are to be cleansed by the company, as well as those made in pursuance of the latter section; and that a summary remedy given by the latter section in case of non-repair by the company, is applicable to a default in cleansing the drains made in lieu of the ancient drain.—*Priestley v. Foulds*, 2 Man. & G. 175; 2 Scott, N. R. 205.

**CARRIER.**

1. (*When a bailee for hire.*) Goods were forwarded by a carrier's waggon to A. in London, and delivered by the carrier to him. A. sent them back to the carrier's warehouse, with directions that they should remain there to await his orders. They remained there accordingly for upwards of a year, when they were lost out of the warehouse. A printed bill issued by the carrier, and sent to A. with the goods, stated that "any goods that should have remained three months in the warehouse without being claimed, or on account of the nonpayment of the charges thereon, would be sold to defray the carriage or other charges thereon, or the general lien, as the case might be, together with warehouse rent and expenses." The carrier had often before carried goods for A., but no goods of his had before lain in the carrier's warehouse: Held, that the carrier was not, under these circumstances, a mere gratuitous bailee of the goods at the time of their loss; and therefore, that A. might recover against him the value of the goods, on a declaration in assumpsit alleging that they were delivered to the defendant to be safely kept for the plaintiff for certain reasonable compensation and reward to be therefore paid by him.—*Cairns v. Robins*, 8 M. & W. 258.
2. (*Tender of money for carriage—Pleading.*) A declaration in case against a common carrier for refusing to carry goods, averred that the plaintiff "was ready and willing, and then offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt, carriage, and conveyance of the said parcel:" Held, on special demurrer, that the averment was sufficient, and that it was not necessary to aver an actual tender of money for the carriage. (1 East, 203; 6 Taunt. 11; 7 Taunt. 314).—*Pickford v. Grand Junction Railway Company*, 8 M. & W. 372; 9 D. P. C. 766.
3. (*Liability of—Limitation of liability by notice—Misdelivery—Pleading.*) A carrier is not bound to convey goods except on payment of the full price for the carriage, according to their value; and if that be not paid, it is competent to



him to limit his liability by special contract. And therefore, where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract. But he is not exempted thereby from all responsibility; but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character as a carrier, or for wilful negligence, but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care.

In case against carriers, the first count stated a delivery to the defendants, at their request, of a case containing certain maps, to be carried, &c., and alleged a receipt thereof by the defendants, whereby it became their duty to take due and proper care thereof; but that they did not take due and proper care of them, whereby the goods were lost. The second count was in trover. Plea to the first count, that at the time of the delivery of the case and its contents, the defendants were common carriers for hire, and then gave notice to the plaintiff, who then had notice and knowledge that the defendants would not be responsible for the loss of, or damage done to, certain goods and chattels delivered to them for the purpose of carriage, and, amongst others, maps in packages or otherwise, unless the same were insured according to their value, and paid for at the time of delivery; that the said case was the package in which the said maps were contained; that they received the case and maps to be carried as aforesaid, upon the terms and conditions of the said notice, and upon no other terms whatsoever, of which the plaintiff at the time of the delivery had notice, and that the maps were not at the time of the delivery insured according to their value, or paid for. To the count in trover there was a similar plea, alleging the conversion to have been by a misdelivery, through mistake and inadvertence. On special demurrer to both pleas: Held, first, that the action being founded on a breach of duty *ex contractu*, the allegation in the pleas of a special contract was sufficient; and that as the defendants accepted the goods only on the terms of the notice, a special averment of the plaintiff's consent was unnecessary. Secondly, that the third plea was not an argumentative traverse of the facts in the declaration, from which the breach of duty was implied. Thirdly, that as the declaration might apply to any kind of negligence, it was not necessary to allege in the third plea, that the loss was occasioned by such negligence as the defendants were not responsible for; and that if the defendants had committed negligence for which they were liable notwithstanding their notice, the plaintiff should have new assigned it. Fourthly, that the case was not separable from the maps. Fifthly, that the plea to the count in trover could not be supported, inasmuch as it admitted a conversion by inadvertent delivery, and did not show that the inadvertence was such as was protected by the notice.—*Wyld v. Pickford*, 8 M. & W. 443.

And see RAILWAY COMPANY.

#### CERTIORARI.

1. (*Effect of clause taking away certiorari.*) A statute taking away certiorari will not prevent the Court of Queen's Bench from setting aside the judgment of an inferior Court, in a case of malversation.

Where at the quarter sessions some of the justices voted in support of an order in which they were interested: Held, that the Court was improperly

constituted, and a case of malversation made out; and the order having been removed, notwithstanding a statute taking away certiorari, was quashed. (8 B. & C. 137; 2 Man. & R. 172; 4 T. R. 71.)—*Reg. v. Cheltenham Paving Commissioners*, 1 G. & D. 167.

2. (*To remove order of sessions—Notice to justices.*) Where an order of sessions has been returned to the Court of Queen's Bench under a certiorari, and a rule is then obtained to quash the order, it is a good preliminary objection to an argument on such rule, that no notice of it has been served on the justices who made the order, although there has been service on the parties interested in supporting it.—*Reg. v. Spackman*, 9 D. P. C. 1060.

#### CHARTER-PARTY.

1. (*Construction of—Demurrage—Pleading.*) The plaintiffs, owners of a ship, agreed by charter-party that the ship should have eighty-five running days for loading and unloading her cargo, and that the freighter might keep her on demurrage for fourteen additional days, at a stipulated rate per diem. The ship arrived in port with five running days due to her. On her arrival, and subsequently on another occasion, the plaintiffs refused to permit her to be unloaded. Afterwards, but not till after the expiration of the running days, she was permitted to unload, but the cargo was not discharged until after the expiration of the fourteen days beyond the the running days. In assumpsit against the freighter on the charter-party, the declaration charged a detention on demurrage for fourteen days, and a general detention beyond.

Pleas, 1, Non assumpsit. 2. That he did not keep or detain the ship modo et formâ. 3. That at the time she was unloading, the plaintiffs wrongfully stopped the unloading, and prevented the defendants from unloading. The jury found that the plaintiff's refusal was wrongful.

Held, on motion for a new trial, and for judgment non obstante veredicto, on the third plea :—

1. That the plea denying the detention of the ship was sufficiently established by the finding of the jury, and that the plaintiffs could not, under this declaration on the charter-party, recover for the use of the ship during so much of the actual unloading as exceeded five days.
  2. But that the third plea was bad; as such an interference by the plaintiffs to prevent an unloading as was stated in the general terms of the allegations of that plea, would not put an end to the obligation of the charter-party.—*Benson v. Blunt*, 1 G. & D. 449.
2. (*Construction of—Improper stowage—Loading deck cargo—Pleading—Inconsistent counts.*) Where, in a memorandum of charter-party, it is agreed that the ship shall proceed to Quebec, and there load from the factors of the freighter a full cargo, not exceeding what the ship can reasonably stow; the latter words are merely a qualification on the ship-owner's engagement to carry a full cargo, and not a substantive agreement on his part to stow the cargo in a reasonable manner.

Upon an issue whether a cargo (loaded upon deck) is improperly loaded, A., a witness called on the part of the plaintiff, to prove that the practice of stowing part of the cargo upon deck is dangerous, states, in answer to a question put to him on his cross-examination, that it is usual for ships in that particular trade to carry deck cargoes. A. may be asked, upon re-examination, whether it is not usual for the ship-owner to pay for deck cargoes washed or thrown overboard.

Upon an issue whether a deck cargo was loaded at the request and by the order and direction of the freighter, proof that the superintendent of the freighter's warehouse, who delivered out the goods for shipping, was aware of and approved of the stowage of the cargo, does not support the affirmative of the issue.

A direction to a jury, that *prima facie* the deck was not the proper place for stowing any part of the cargo, and that it increased the danger of the ship, or of that part of the cargo, it is an improper stowage, was held to be correct, though it appeared it had been usual to load deck cargoes in the particular trade, but it also appeared to be usual for the ship-owner to bear the loss of a deck cargo washed or thrown overboard.

Where a declaration contains two inconsistent counts, and the defendant pays money into Court upon the second count, which the plaintiff accepts, the defendant cannot read the second count and the proceedings thereon to the jury as conclusive or as any evidence to negative an allegation in the first count.—*Gould v. Oliver*, 2 Man. & G. 208; 2 Scott, N. R. 241.

3. (*Condition precedent.*) A charter-party stipulated that the vessel should proceed to Trieste, and there load a full cargo of wheat, &c., and being so loaded should proceed therewith to a port in the united kingdom, "the vessel to sail from England on or before the 4th of February then next:" Held, that the sailing of the vessel from England on or before the day named was a condition precedent to the owner's right to sue the merchants for not providing a cargo at Trieste.—*Glaholm v. Hays*, 2 Scott, N. R. 471.

CHEQUE. See PLEADING, 7.

CLERGYMAN. See MARRIAGE.

COGNOVIT.

- (*Attestation of.*) Under the stat. 1 & 2 Vict. c. 110, s. 9, the attestation of an attorney to a cognovit must not only state that he is the attorney for the party executing it, but also that he subscribes his name *as such attorney*. (8 D. P. C. 113.)—*Potter v. Nicholson*, 8 M. & W. 294; 9 D. P. C. 808.

COMMON.

- (*Action for disturbance of—Boundary Act—Pleading.*) In case for disturbance of a right of common, the declaration alleged that the mayor, aldermen, and burgesses of the town and borough of Stamford had the right in question for every resident freeman paying scot and lot. It appeared in evidence that the right relied upon was an ancient right. By 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, part of an additional parish is thrown within the borough of Stamford.

Held, that the declaration was not supported, as the right claimed was larger than that proved.—*Beadsworth v. Torkington*, 1 G. & D. 482.

CONDITION.

- (*Precedent or subsequent.*) In an action against the defendant for the breach of a contract to go as surgeon on board an emigrant vessel bound for Australia (the contract being contained in a series of letters), it appeared that in the course of the correspondence the plaintiffs represented that the ship was A. 1, and of the burthen of 490 tons; that the duties of surgeon would be light, as the vessel would not take of emigrant labourers above 40; and that the plaintiffs would find drugs: Held, that none of these were conditions precedent that need be noticed in the declaration.

The defendant was informed, during the progress of the agreement, that any appointment the plaintiffs might make must be subject to the approval of the emigration commissioners: Held, that such approval was not a condition precedent, but at most a condition subsequent, or in the nature of a defeasance.—*Richards v. Heyward*, 2 Scott, N. R. 670.

#### CONTRACT OF SALE.

1. (*Acceptance by vendee of imperfect performance by vendor.*) A written contract was entered into for the purchase of "200 or 300" tons of coals, to be sent by the "Navigator, or other vessel." The vendor, residing at Stockton-on-Tees, on the 31st December, 1838, shipped 120 tons of coals by the George and Henry, and on that day wrote to the vendee at Southampton to state what he had done, and that he should draw on him for the amount. The George and Henry was sunk at sea on the 6th January, 1839, which fact the vendor, on the 10th January, communicated to the vendee. The vendor's bill was not presented to the vendee until after he knew of the loss, and he then refused to accept it, but he did not by any other act repudiate the contract as performed by the vendor: Held, that his silence after receiving the vendor's statement of the mode in which he had performed the contract, operated either as an admission by him that the contract was duly performed, or as evidence of acceptance of the substituted performance for that originally contracted for.—*Richardson v. Dunn*, 1 G. & D. 417.
2. (*Delivery, when made at reasonable time.*) The plaintiffs contracted to sell the defendant ten tons of linseed oil at a certain price, "to be free delivered within the last fourteen days of March." In an action on the case against the defendant, for refusing to accept the oil, the declaration stated the contract in hæc verba, and averred a tender and offer to deliver the oil within the last fourteen days of March, and a refusal by the defendant to accept or pay for the same. The defendant pleaded that the tender was made on the last of the said fourteen days of March, at a late time of the day, to wit, at 9 P. M., the same being an unreasonable and improper time for such tender. The jury found that the tender was made at an unreasonable and improper time: Held, that the defendant was entitled to the verdict; a delivery within reasonable hours, that is, the hours of business, being necessarily implied.—*Startup v. Macdonald*, 2 Scott, N. R. 485.
3. (*Warranty in.*) Where the seller is also the manufacturer of goods, a warranty is implied in the contract of sale, that the goods shall be reasonably fit and proper for the purpose for which they are bought.  
And *semble* that the rule is not so limited, but extends to all cases where the buyer relies on the skill and judgment of the seller. (4 B. & C. 108; 5 Bing. 533.)—*Brown v. Edgington*, 2 Scott, N. R. 496.
4. (*Of railway shares—Non-acceptance of—Evidence—Measure of damages.*) In an action for the non-acceptance of railway shares, which by the contract (made at Liverpool through brokers) were to be delivered in a reasonable time, a written rule of the Liverpool Stock Exchange, stated to be acted upon by all the Liverpool brokers—"that the seller of shares was in all cases entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he was acquainted with the name of his transferee"—was held admissible on an issue whether the plaintiff within a reasonable time was ready and willing and offered to transfer the shares; although it was not

proved that either of the parties, or their brokers, was a member of the Liverpool Stock Exchange.

In such action, the proper measure of damages is the difference of the prices of the shares, according to the contract, and on the day when they were resold by the vendor, such resale being within a reasonable time.—*Stewart v. Cauty*, 8 M. & W. 160.

5. (*Of house, construction of.*) Declaration in assumpsit stated, that the plaintiff bargained to buy of the defendant, and the defendant agreed to sell to him, a dwelling-house and fixtures therein, for the residue of a term of years then and still unexpired therein, to commence from a certain day, to wit, the 1st of January, 1840, for the sum of 60*l.* : and that thereupon the defendant promised to execute a proper conveyance, to make out an abstract of title, and deliver possession from the 1st of January, 1840, &c. At the trial, the following paper, signed by the defendant, was read in evidence : “ I agree to sell the house and fixtures, No. 163, Piccadilly, to commence from the 1st of January next, for 60*l.* :” Held, that this document imported the sale of an interest in fee simple, and did not sustain the contract as alleged in the declaration.—*Hughes v. Parker*, 8 M. & W. 244.

#### CONVICTION.

1. (*Sufficiency of—Vagrant act.*) In an action against a justice of the peace for false imprisonment, who justified under a conviction under the Vagrant Act, 5 Geo. 4, c. 83 : Held, first, that the conviction was not vitiated by the omission of the word “ part ” before “ of Great Britain,” in the recital of the title of the statute, as directed in the form given by the act. Secondly, that in pursuing that form, it was not necessary to state the evidence on which the conviction proceeded ; and thirdly, that an allegation that the person convicted was of sufficient ability to maintain his family, and did neglect so to do, whereby his wife became chargeable to the parish, was sufficiently certain.—*Nixon v. Nanney*, 1 G. & D. 370.
2. (*Sufficiency of—Power of justice to amend—Pilot Act.*) Whether or not a justice of the peace may draw up a corrected record of a summary conviction after he has returned one record of it to the quarter sessions, he cannot do so in a case where the first conviction has been brought up by a writ of habeas corpus and discharged on the ground of the insufficiency of the conviction, as appeared by the recital in the warrant of commitment, the conviction itself not having been brought up by the crown, and the certiorari having been taken away from the prisoner by statute. Such proceeding is equivalent to a quashing of the first conviction, and a justice of the peace cannot afterwards draw up another formal one.  

A conviction under the 70th section of the Pilot Act, 6 Geo. 4, c. 125, for “ continuing ” in charge of a ship after a duly licensed pilot had offered to take charge of it, is bad, if it do not show that the offer was made to or in the presence of the party in charge of the vessel, or that it otherwise comes to his knowledge. It ought also to appear in the conviction, that the defendant was the person in charge of the vessel when the offer was made ; and semble, that this does not sufficiently appear from an allegation that he “ continued ” in charge of it after the offer. Though the consent of the warden of the Cinque Ports, or of the Trinity House Corporation is respectively required, before proceeding to recover penalties under the Pilot Act, it is not necessary that such consent should appear in the conviction, which is sufficient in that respect, if it follow the form given by that statute.—*Chaney v. Payne*, 1 G. & D. 348.

**COPYHOLD.**

(*Custom—Dower.*) By the custom of the manor of Cheltenham, as settled in 1 Car. 1, the widow of a copyholder is entitled to dower out of all the customary lands of which her husband was tenant during the coverture, although he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife having been examined in Court, or having joined in the surrender.

Where such lands, between the time of alienation by the husband and of his death, have been improved by buildings, the widow is entitled to dower according to their value at the time of his death, although one-third remain not built upon. And if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each such possession. (10 Bing. 29.)—*Doe d. Riddell v. Gwinnell*, 1 G. & D. 180.

**CORONER'S INQUISITION.**

A coroner's inquisition, in which things moving to the death were described as the property of the "proprietors of the Hull and Selby Railway," was quashed, there being no corporation of that name, or other similar name, than "the Hull and Selby Railway Company."—*Reg. v. West*, 1 G. & D. 481.

And see **DEODAND**.

**CORPORATION.**

(*Indictment against corporation aggregate.*) A rule to quash an indictment for misdemeanor against a corporation aggregate in their corporate name, on the ground that such indictment does not lie, was discharged, the Court expressing no opinion on the question, but leaving the defendants to take the objection on demurrer, with liberty to plead over in case of a decision against them.—*Reg. v. Birmingham and Gloucester Railway Company*, 1 G. & D. 457.

**COSTS.**

1. (*Of proving document—Notice to admit and inspect.*) In an action by the coroner of the county of Lancaster for disturbance in his office, the plea set forth a charter granted by the Crown to the borough of Manchester, pursuant to the stat. 1 Vict. c. 78, s. 49, and the issue in the cause was, whether the petition for such charter was the petition of the inhabitant householders of the borough, and whether the charter was accepted by them. The defendant had witnesses in attendance at the trial, to prove the genuineness of the signatures to the original charter, which was lodged at the Privy Council office: Held, that the charter was a document which the defendant ought to give a notice to admit and inspect, within the rule of H. T. 4 Will. 4, s. 20, and that not having done so, he was not entitled to the costs of the witnesses above mentioned. The rule extends to every document which a party proposes to adduce in evidence, and is not confined to documents in his custody or control.—*Rutter v. Chapman*, 8 M. & W. 388.

2. (*Certificate under 3 & 4 Vict. c. 24, s. 2, in what cases grantable.*) In an action for libel, the judge has power to certify, under the 3 & 4 Vict. c. 24, s. 2, that the grievance for which the action was brought was wilful and malicious.

The words of the statute, "wilful and malicious," import personal malice and ill will to the plaintiff, as contradistinguished from the malice in law which is essential to sustain an action for libel.—*Foster v. Pointer*, 8 M. & W. 395.

3. (*Construction of 3 & 4 Vict. c. 24, s. 2.*) The words "immediately afterwards," in this statute, mean, within a reasonable time after the trial. (9 D.P.C. 717.)—*Page v. Pearce*, 9 D. P. C. 815.
  4. (*Security for.*) The Court will not compel a plaintiff, who is a private in the East India Company's service, in India, to give security for costs.—*Garwood v. Bradburn*, 9 D. P. C. 1031.
  5. (*Same.*) The death of the lessor of the plaintiff in ejectment, after verdict, and pending a rule for a new trial, is no ground for the defendant's calling for security for costs, where the interest claimed by him was more than a life estate.—*Doe d. Cozens v. Cozens*. 9 D. P. C. 1040.
- And see ARBITRATION, 1 ; ATTACHMENT, 2.

#### COURT OF ADMIRALTY.

(*Jurisdiction of, in cases of collision.*) In a suit in the Admiralty for compensation for damage done by collision, the defendant, the owner of the vessel, appeared and contested his liability; he did not release the vessel, which had been arrested, by giving bail, but allowed it to remain under arrest to answer the suit: Held, that the Court of Admiralty had jurisdiction to give costs beyond the amount of the value of the vessel, notwithstanding the statute 53 Geo. 3, c. 159. (2 Haggard, 137.)—*Ex parte Rayne*, 1 G. & D. 374.

COURT OF EXCHEQUER. See PRACTICE IN REVENUE CASES.

#### COURT OF REQUESTS.

1. (*Warrant of, how far a protection to its officer.*) The commissioners of a Court of Requests were empowered to award execution against the person of a party ordered to pay money, and thereupon the clerk of the court, at the prayer of the party prosecuting the order, was to issue a precept by way of ca. sa. to the serjeant of the court, who was thereby authorized to take the debtor. The commissioners were also empowered to order debts to be paid by instalments, and under such terms as appeared to them reasonable, and on default in paying such instalments, the commissioners present in Court, upon due proof of such default, were authorized to award execution for the instalment, in the same manner as for the debt first decreed. A party against whom an order had been made by the commissioners to pay a sum by instalments, neglected to pay an instalment, whereupon, at the request of the complainant, and without any previous order of the commissioners, but according to the practice of the Court, the clerk of the Court issued a warrant, under which the serjeant of the Court took the debtor.

Held, 1, that the warrant was illegal, as execution had not been awarded by the commissioners present in Court, upon due proof of the default, and that the clerk who issued the warrant was liable in trespass at the suit of the debtor.

Held, 2, that the serjeant who executed the warrant was protected by the warrant, and was not liable. (3 Lev. 20; Willes, 30, 122.)—*Andrews v. Morris*, 1 G. & D. 268.

2. (*Liability of commissioners of, in trespass—Warrant of, how far a protection to its officer.*) The commissioners of an inferior Court, with jurisdiction to try cases of debt, where the debtor resided within a certain district, and to award execution against the person, entertained a claim of debt against one who did not reside within their jurisdiction, and issued a warrant against him, under which he was taken in execution by the officer of the Court. In trespass against the plaintiff below, the commissioners, and the officer of the Court, held, 1,



that the plaintiff below, who had merely stated his case to the Court, was not liable. 2, that the commissioners were liable. 3, that the officer, who would generally be protected by a warrant under such circumstances, was liable in this case, because the warrant under which he acted did not describe the Court by its proper name and style.—*Carratt v. Morley*, 1 G. & D. 275.

#### COVENANT TO REPAIR.

1. A covenant by a lessor to repair the external parts of the demised messuages, comprises the boundary walls of it, though they adjoin other buildings. At all events, the lessor is liable under it to compensate the lessee for the damage arising from non-repair of such a wall, which arises after the adjoining building has been pulled down, though the damage be a consequence of such pulling down, he having made no attempt to prevent the damage arising from the further sinking of the wall, and though the adjoining building was pulled down in execution of powers given by an act of parliament, which contained a clause for the compensation of persons sustaining damage by the exercise of them.

Quære, whether in such a case an action will lie against the lessor before a reasonable time has elapsed for the restoration of the wall by him: and held, that even if so, an action would be maintainable before such reasonable time had elapsed, he having on application contested his liability to do repairs, and given an unqualified refusal to do them.

In such an action, the lessee, after such refusal, having rebuilt an external wall, is entitled to recover the costs thereof, the jury having found that this was the proper mode of restoring it.

He may also recover the price of damage done to plate glass and fixtures, in consequence of the sinking of the wall. But the lessee cannot recover the rent paid by him for the occupation of other premises, during the progress of the repairs, though during that time the demised premises were not safely habitable.—*Green v. Eales*, 1 G. & D. 468.

2. (*Forfeiture by breach of—Dilapidations—Damages in action on covenant by plaintiff evicted for the forfeiture.*) In covenant, the declaration stated that the plaintiffs and A. B., since deceased, being possessed of a certain house for the residue of a certain term of ninety-four years wanting twenty days, demised the same to the defendants for twenty-one years, at a certain rent, by an indenture containing a covenant to repair, and alleged a breach of that covenant, by means whereof all the estate and interest of the plaintiffs and A. B. became and was forfeited and the same reverted to C. D., who thereupon availed himself of the forfeiture, and brought an ejectment, in which he recovered judgment and obtained possession of the house, by means of which premises the plaintiffs, since the death of A. B. have lost the rents covenanted to be paid by the defendants, &c.

The plea traversed the alleged breach of the covenant to repair, on which issue was joined.

At the trial, the plaintiffs claimed damages for the loss of their term, and for the amount of the dilapidations in the house demised to the defendants. It appeared by the particulars delivered in the ejectment brought by C. D. that such ejectment was founded on the breach of certain covenants contained in a superior lease granted by C. D. for ninety-nine years, and that the breaches of covenant relied on were the non-repair of various houses, including the house in question (which was shown to be out of repair), and for the breach of a covenant which was not contained in the lease to the defendants: Held, first, inasmuch as it did not appear that C. D. might not have recovered possession of the property for a

breach of the covenant not contained in the lease to the defendants, that the plaintiffs were not entitled to recover the value of their term from the defendants.

Secondly, they were entitled to recover the amount of the dilapidations in the house in question at the time that the ejectment was brought for the forfeiture.—*Clow v. Brogden*, 2 Man. & G. 39 ; 2 Scott, N. R. 303.

CUSTOM. See COPYHOLD.

DAMAGES. See CONTRACT OF SALE, 4.

DEED.

1. (*Estoppel by recital in.*) Where a distinct statement of a particular fact is made in the recital of a deed or other instrument under seal, and a contract is made with reference to that recital, it is not, as between the parties to the instrument, and in an action upon it, competent to the party bound to deny the recital ; and a recital in an instrument not under seal may be such as to be conclusive to the same extent.

But a party to an instrument is not estopped, in an action by another party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted ; but evidence of the circumstances under which such admission was made, is receivable to show that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish.—*Carpenter v. Buller*, 8 M. & W. 209.

2. (*Voluntary deed, how far void.*) Where a father, by deed, assigned to his son, “ in consideration of natural love and affection,” his dwelling-house and all his personal estate : Held, in an action by the son against the sheriff, for levying on goods, part of such estate, under a fi. fa. against the father, that it was competent to the plaintiff to prove that by a bond, bearing even date with the deed of assignment, he bound himself to maintain his father’s wife and children ; and that, the jury having found that it was a part of the same transaction, and that the assignment was *bonà fide*, it was not void against creditors under the stat. 13 Eliz. c. 5. (1 Ves. sen. 128.)—*Gale v. Williamson*, 8 M. & W. 405.

DEMURRAGE. See CHARTERPARTY, 1.

DEODAND.

A deodand cannot be imposed by a coroner’s jury upon the instrument of death, where they find the homicide to have been felonious. (3 Inst. ch. 9 ; Hale Pl. Cr. ch. 32 ; Bac. Abr. Deodands ; Foster A. L. Deodand ; 1 Hawk. 1, ch. 8 ; 5 Rep. 110.)—*Reg. v. Polwart*, 1 G. & D. 211 ; 9 D. P. C. 1048.

DEPOSIT IN LIEU OF BAIL.

Where a sum had been paid into Court to abide the event of the suit, pursuant to the 7 & 8 Geo. 4, c. 71, and the cause and all matters in difference being referred, a sum was awarded in favour of the plaintiff in the action, the Court made absolute a rule obtained by the plaintiff for payment out of Court to him of a part of the sum deposited, but refused, on disposing of that rule, to direct the payment out of the residue to the defendant, leaving him to make a separate application for that purpose.—*Fowle v. Steinkeller*, 9 D. P. C. 1037.

And see EXECUTION, 4.

DEVISE.

1. (*Implication of estate tail—Devise over.*) A. by his will, after bequeathing certain pecuniary legacies to C. and D., his son and daughter by a second marriage, and 100*l.* to his granddaughter E., declared, “ but if it should happen that my son B. should marry and have heirs of his own, then my will is, that my exe-

cutors shall pay unto E. the further sum of 100*l.* in addition to the 100*l.* before bequeathed to her, to be paid within twelve months after the birth of B.'s first child." And after giving certain specific legacies to C. and D., he proceeded as follows :—" In case it should happen that B. (A.'s eldest son and heir at law), should depart this life, and having no heirs lawfully begotten, and that my freehold tenement situate, &c. should fall by descent unto E., and she inherit and possess the same, then my will is, that E. shall pay out of my said freehold tenement the sum of 400*l.*, viz. 200*l.* to C. and 200*l.* to D., the same to be paid within twelve months after E. comes into possession of the said estate ;" adding a power of entry and sale in case of non-payment of the 400*l.*

Held, first, that the words " in case it should happen that my son B. should depart this life, and having no heirs lawfully begotten, and that my freehold tenement should fall by descent unto E.," contemplated an indefinite failure of issue, from which an estate tail in B. might be implied.

But held, secondly, that the will contained no devise over to E., express or to be implied, so as to cut down the estate taken by B., the heir at law, to an estate tail, with remainder to E. in fee, though there was strong ground for conjecturing that the testator intended E. to succeed to an estate in case his heir, B., should die without issue. In order to cut down the interest of B., the heir, to an estate tail, an express devise over is unnecessary, if the intention of the testator that the estate should go over in case B., the heir, died without issue, is clearly manifested by the will.—*Doe v. Cape v. Walker*, 2 Man. & G. 113; 2 Scott, N. R. 317.

2. (*Shifting use.*) By indenture of the 12th of April, 1804, and by a fine and recovery levied in pursuance thereof, certain hereditaments and premises were settled to the uses of such persons, &c., as the settlor should by deed or will appoint; and in default of appointment, to the use of the settlor in tail general; remainder to J. L., the second son of the late Sir J. L., for life; remainder to the eldest son of J. L. in tail male; remainder to the second, third, fourth, fifth, and all and every other the son and sons of the body of the said J. L. in tail male; remainder to L. C. for life, with remainders over: subject to a proviso " that in case J. L., or any issue male of his body, shall become entitled to the possession or to the receipt of the rents and profits of the family estates of the said Sir J. L. deceased, then and in every such case the uses and estates hereinbefore limited, expressed, and declared of and concerning the said hereditaments and premises whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession or the receipt of the rents and profits of the family estates of the said Sir John L., and to or for the benefit of the issue male of such person or persons so becoming entitled, shall cease, determine, and be absolutely null and void: and then and in every such case, all and singular the said hereditaments and premises shall immediately thereupon, from time to time, devest out of the person or persons so becoming entitled, and shall go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male." J. L., as the second son of the late Sir J. L., became entitled to the possession of the family estates mentioned in the proviso, in the lifetime of the testator, who afterwards died without issue, and without having exercised the power of appointment. At the time of his death there were living the said J. L. (then Sir J. L., Bart., who had become entitled to the family estate), J. H. L., the eldest son of the said Sir J. L. the

son, H. L., his second son, and four other sons, also the said L. C. mentioned in the indenture : Held, that the remainders to the sons of J. L. were destroyed, and that L. C. took an estate for life. (3 Ad. & El. 897.)—*Morrice v. Langham*, 8 M. & W. 194.

#### DISTRESS.

1. (*Of fixtures.*) Fixtures cannot be distrained for rent. (7 Taunt. 188; 4 B. & Ald. 206.)—*Darby v. Harris*, 1 G. & D. 234.
2. (*Tender after impounding.*) A tender of rent and costs of distress, after impounding, is too late, and no action lies for selling the distress notwithstanding such tender.

*Quære*, whether such action be maintainable on allegation and proof of *malice*.—(8 Rep. 147 a ; 5 T. R. 432 ; 4 P. & D. 9 ; 1 Man. & G. 695.)—*Ellis v. Taylor*, 8 M. & W. 415.

And see LANDLORD AND TENANT.

#### DOCK COMPANY.

(*Liability to repair—Mandamus.*) The Bristol Dock Company were required by act of parliament to make and maintain a new channel, with equal depth and breadth at the bottom, and with equal inclination of the sides to the former channel.

Held, 1. That a duty was cast upon the company to repair generally the banks of the new course. 2. That mandamus would lie to compel the company to repair, although there might be another remedy by indictment. 3. That to a mandamus commanding the company generally to repair the banks, it was a good return, that they had maintained the channel with equal depth and breadth at the bottom, and with equal inclination of the sides to the old channel.—*Reg. v. Bristol Dock Company*, 1 G. & D. 286.

#### DONATIO MORTIS CAUSA.

A gift may be good as a donatio mortis causâ, although it be coupled with a trust that the donee shall provide the funeral of the donor. (4 Bro. Ch. C. 72.)—*Hills v. Hills*, 8 M. & W. 401.

DOWER. See COPYHOLD.

#### EJECTMENT.

1. (*Letting in corporation to defend—Consent rule.*) The Court will not let in a corporation to defend an ejectment without entering into the usual consent rule to admit possession, on the ground, whether well or ill founded, that the land of a corporation cannot be taken in ejectment on a writ of elegit, upon a judgment against the corporation for debts contracted since the passing of the Municipal Corporation Act.

It is too late in Hilary Term to seek to set aside for irregularity of service a declaration in ejectment served in the July previous, and a rule for judgment obtained in Michaelmas Term ; the defendant having in the vacation following applied by summons for time to appear and plead.—*Doe d. Parr v. Roe*, 1 G. & D. 220.

2. (*Service.*) Where the service is on a servant, an affidavit of an acknowledgment by the tenant on the first day of term, that the declaration and notice had come to his hands before the term, is sufficient for judgment against the casual ejector.—*Doe d. Figgins v. Roe*, 2 Scott, N. R. 448.

3. (*Judgment against casual ejector.*) A motion for judgment against the casual ejector cannot be made where the proceedings in the cause are stayed by an injunction.—*Doe d. Duke of Beaufort v. Roe*, 2 Scott, N. B. 548.
4. (*Same.*) The Court refused to allow a rule for judgment against the casual ejector to be drawn up on the last day of term, on an affidavit to be made and filed on a subsequent day.—*Doe d. Morgan v. Roe*, 2 Scott, N. B. 584.
5. (*Service.*) After repeated attempts to serve the tenant in possession, a copy of the declaration was left at his house on the day before term. On the first day of term a letter was received from his attorney, dated the day before, acknowledging the receipt of it. Held sufficient to entitle the plaintiff to judgment.—*Doe d. Gibbard*, 9 D. P. C. 844.
6. (*Amendment of date of demise.*) The date of the demise, if laid too soon, is amendable by the judge at nisi prius, under the 3 & 4 Will. 4, c. 42, s. 23, and the terms of the consent rule apply themselves to the amended declaration.—*Doe d. Edwards v. Leach*, 9 D. P. C. 877.
7. (*Notice, form of.*) Where the notice at the foot of the declaration required the tenant to appear in the "Common Bench," instead of the "Queen's Bench," (the declaration being entitled in the Queen's Bench,) the Court granted a rule nisi for judgment against the casual ejector.—*Doe d. Evans v. Roe*, 9 D. P. C. 999.
8. (*Writ of restitution.*) Where a defendant in ejectment, after possession given to the lessor of the plaintiff by the sheriff, afterwards, on the same day, forcibly resumed possession, the Court ordered a writ of restitution to issue in a week, at the cost of the defendant.—*Doe d. Pitcher v. Roe*, 9 D. P. C. 971.
9. (*Staying proceedings in second ejectment.*) A rule for staying proceedings in a second ejectment till the costs of the first are paid, will be discharged on affidavit of the lessor of the plaintiff that his claim is not founded on the same title, though he does not state under what title he does claim.—*Doe d. Bailey v. Bennett*, 9 D. P. C. 1012.
10. (*Service on foreigner.*) Where the tenant in possession is a foreigner not understanding English, the purport of the declaration and notice in ejectment may be explained to him through an interpreter.—*Doe d. Cuttell v. Roe*, 9 D. P. C. 1023.
11. (*Service on partners.*) Service on the acting partner of a firm in possession of the premises sought to be recovered, is sufficient.—*Doe d. Overton v. Roe*, 9 D. P. C. 1039.

And see ATTACHMENT, 3 ; COSTS, 5 ; PRACTICE, 6 ; SHERIFF, 1.

#### ELEGIT.

- (*Right of elegit creditor to rent.*) Where rent became due after the delivery of a writ of elegit to the sheriff, but before the inquisition was taken thereon, held, that the execution creditor was not entitled to the rent.—*Sharp v. Key*, 8 M. & W. 379 ; 9 D. P. C. 770.

#### EVIDENCE.

1. (*Parol evidence to vary contract of sale.*) The defendant's traveller entered and signed in the plaintiff's order book a contract in the following terms : " Of E. Y. 39 pockets, Sussex hops, Springett's 5 pockets, Kenward's, 78s., Springett to wait orders." In an action by the purchaser for non-delivery of the 39 pockets,

parol evidence of the course of dealing between the parties was held not to be admissible to show that the sale was at a credit of six months.—(3 Campb. 426.) *Ford v. Yates*, 2 Scott, N. R. 645.

2. (*Of what facts the Courts will take judicial notice.*) The Courts will not take judicial notice that a particular *street* is not in a certain county, though it may be generally known to be situated in another.—*Humphreys v. Budd*, 9 D. P. C. 1000.

And see JOINT STOCK COMPANY.

## EXECUTION.

1. (*Concurrent Writs.*) A testatum fi. fa. indorsed to levy 2584*l.*, issued on the 14th January, 1841, under which, on the 20th January, the sheriff seized the defendant's goods. While the officer continued in possession, the defendant entered into an agreement with the plaintiff, that on payment to him of the sum of 500*l.*, the officer should withdraw, and that the judgment should stand as a security for the payment of the residue of the debt in monthly sums of 200*l.* each; in default in payment of any such monthly instalments, the plaintiff to be at liberty immediately to re-enter into possession. The officer withdrew from possession accordingly, and no return was made to the writ: but default being made in payment of the instalments, a second writ of testatum fi. fa. issued on the 14th of April, indorsed to levy 2701*l.*, the amount then due to the plaintiff, under which the sheriff re-entered and took possession of the goods: Held, that there was an actual levy under the first writ to the extent of 500*l.*, and therefore that the second writ was irregular, since it ought not to have issued until the first had been returned, and ought to have recited the first writ, and the amount levied under it.—*Chapman v. Bowlby*, 8 M. & W. 249.
2. (*On judgment under 1 & 2 Vict. c. 110, s. 18.*) A plaintiff having obtained an order for taxation of his attorney's bill of costs, it was taxed accordingly, but the allocatur was not served on the plaintiff in the regular way, but was sent to him by post, and no demand was made on him for the amount. The attorney afterwards obtained, on an ex parte application, an order on the plaintiff to pay the amount found by the master to be due, which without any notice of it to the plaintiff he made a rule of Court, and issued a fi. fa. thereon, under the 1 & 2 Vict. c. 110, s. 18. Held, that the execution was irregular. (11 Ad. & E. 175.)—*Rickards v. Patterson*, 8 M. & W. 313.
3. (*Variance of writ from judgment—Amendment of writ.*) A writ of fi. fa., whereby the sheriff is directed to levy a sum different in amount from that mentioned in the judgment, although smaller, is irregular; unless the reason of the variance be shown on the face of the writ. And the Court will not amend the writ, where the rights of third persons have intervened: as where the defendant has become bankrupt since the execution of the writ.—*Webber v. Hutchins*, 8 M. & W. 319.
4. (*What money may be taken under—Operation of 1 & 2 Vict. c. 110, s. 12.*) Money deposited in Court in one action, pursuant to the 43 G. 3, c. 46, s. 2, and the 7 & 8 G. 4, c. 71, s. 2, cannot be paid out to an execution creditor in another action, in satisfaction of his claim, notwithstanding the provisions of the 1 & 2 Vict. c. 110, s. 12, as that section does not give power to seize money in execution while in the hands of a third person as trustee for the defendant.—*France v. Campbell*, 9 D. P. C. 914.

And see BANKRUPTCY, 1.

**EXECUTOR AND ADMINISTRATOR.**

(*Prerogative administration, when sufficient.*) A warrant of attorney to secure advances made by a banking company, was executed to the manager of the company, appointed under the 7 G. 4, c. 46, and authorised him, "his executors and administrators," to enter up judgment. Held, that a prerogative administration in the province of Canterbury was sufficient to authorize his administratrix to enter up judgment, although at the time of his death the debtors resided within the province of York.—*Edwards v. Holiday*, 9 D. P. C. 1023.

**FIXTURES.** See **DISTRESS**, 1.

**GAMING.**

The judgment of the Court of Queen's Bench, in *Lane v. Chapman*, 3 P. & D. 668, 11 Ad. & E. 966, was affirmed on error in the Exchequer Chamber.—*Chapman v. Lane*, 11 Ad. & E. 681.

**HERIOT.**

Where a customary heriot of the best beast is due, on the death of a tenant, to the lord of the manor, no property in any specified beast vests in the lord before selection by him of the best.

A selection of seven beasts as heriots, when the lord is entitled to five only, will not be sufficient to vest in the lord the property in any five of them.—(Plowd. 96; Cro. Eliz. 32,589.)

*Quære*, whether in trover, if seven things are demanded when there is a right to five only of them, a general refusal is evidence of a conversion of such five.—*Abington v. Lipscombe*, 1 G. & D. 230.

**HIGHWAY.**

1. (*Surveyor's accounts—Appeal—Mandamus.*) An appeal does not lie to the Court of Quarter Sessions against an allowance of the accounts of the surveyor of the highways by justices at special sessions under 5 & 6 W. 4, c. 50, s. 44. Nor will the court grant a mandamus to the special sessions, after they have once adjudicated on and passed the accounts, to require them to re-examine such accounts, although it appears that improper items have been passed, and the justices who passed them did not investigate the case fully, believing that an appeal lay from them to the quarter sessions.—(5 T. R. 629, 701.)—*Rex v. Justices of the West Riding of Yorkshire*, 1 G. & D. 198.

2. (*Diversion of footpath under 5 & 6 W. 4, c. 50, s. 85.*) A footpath led from the hamlet of Wyke to a turnpike road which led in one direction to the town of Axminster, and in the other to various other places. It was proposed to divert a part of this footpath by making it join the road at a point somewhat nearer Axminster.

Two justices certified (under 5 & 6 W. 4, c. 50, s. 85,) for the diversion of this footpath, described as leading "from W. to A.," and stated in their certificate that the intended footpath was "nearer and more commodious than the old."

Against this diversion an appeal was tried at the quarter sessions, under section 88, and the grounds of appeal were, that "reference being had to the various places with which the original footpath communicated, the new line was not nearer nor more commodious than the old."

It appeared that the proposed new line of footpath joined the turnpike road at a point nearer to Axminster than the old, and was consequently nearer as between Wyke and Axminster only, but that it was not so near as between Wyke and the other places mentioned: Held, 1. That the jury were properly directed



to construe the word "nearer," not as between W. and A., but as between the point at which the new and old lines of footpath diverged, and the point where the old line reached the road. 2. That the jury having found that the footpath was not nearer than the old, but that it was more commodious, the order for diverting the footpath could not be made, as it was necessary, under section 89, that the substituted line should be both "nearer" and "more commodious."—*Reg. v. Shiles*, 1 G. & D. 304.

And see SESSIONS, 1.

## HUSBAND AND WIFE.

1. (*Payment to wife, effect of—Pleading.*) To a count for work done and attendance given to A., then and still the wife of the plaintiff, for the defendants; and at their request, the defendants pleaded payments made from time to time to the wife, and acceptance by her in satisfaction of the cause of action and damages. Held bad, for not averring that the wife was authorized by the plaintiff to receive payment. (3 Camp. 10.)—*Offley v. Clay*, 2 Man. & G. 172; 2 Scott, N. R. 372.
2. (*Acknowledgment under 3 & 4 W. 4, c. 74, s. 85, taken abroad.*) The affidavit verifying the notarial certificate of the due taking of an acknowledgment under the 3 & 4 W. 4, c. 74, s. 85, may, in Russia, be sworn before a British Consul; no magistrate in that country having authority to administer oaths.—*Ex parte Bayley*, 2 Scott, N. R. 523.
3. (*Acknowledgment of married woman under 3 & 4 W. 4, c. 74—Amendment of certificate.*) The certificate of a married woman taken under the above statute stated her to have acknowledged the execution of indentures of lease and release: she was in fact party only to the indenture of release. The Court refused, on motion, to order the amendment of the certificate.—*Ex parte Witty*, 9 D. P. C. 838.
4. (*Acknowledgment of married woman under 3 & 4 W. 4, c. 74—Affidavit sworn abroad.*) The affidavit verifying the acknowledgment of a married woman, taken in Philadelphia, began thus: "Be it remembered that on &c., came before me, T. B., alderman of Philadelphia, &c., J. S., &c., and in due course of law deposed and swore," &c. It then proceeded in the ordinary form of an affidavit, was subscribed by the defendant, and was accompanied by the usual notarial certificates. The Court received it, though not in exact compliance with the rule of H. T. 4 W. 4.—*Ex parte Shaw*, 9 D. P. C. 839.
5. (*Conveyance by married woman—Affidavit of wife necessary.*) The Court will not make an order for the conveyance of property of a married woman without her husband's concurrence, under the 3 & 4 W. 4, c. 74, without an affidavit from the wife herself. (9 D. P. C. 72.)—*Ex parte Bruce*, 9 D. P. C. 840.
6. (*Conveyance by married woman under 3 & 4 W. 4, c. 74—Affidavit, when sufficient.*) The affidavit in support of an application for an order to dispense with the husband's concurrence to a conveyance of property of the wife, stated that the husband had absconded from home to avoid being arrested, and had since sailed for New South Wales; that the wife had heard nothing of him since, and believed him to be on his second voyage; that he had been made a bankrupt; and that before he absconded, he had sold her interest in the estate. Held sufficient. *Ex parte Stone*, 9 D. P. C. 843.

And see ARBITRATION, 2; PLEADING, 8.

**INFERIOR COURT.**

(*Pleadings in cause removed from.*) Where a cause is removed by pone from an inferior Court, it is not necessary to allege in the declaration in the superior Court that the cause of action arose within the jurisdiction of the inferior Court — *Powell v. Ancell*, 2 Scott, N. R.

**INFORMATION OF INTRUSION.**

(*Venue in—Prerogative of crown.*) In an information of intrusion, the Crown has not the right, as of its prerogative, to lay the venue in any county, or to issue the venire facias juratores into a different county from that in which the venue is laid—*Attorney-General v. Lord Churchill*, 8 M. & W. 171; 9 D. P. C. 772.

**INNKEEPER.**

Although a traveller is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose.—*Fell v. Knight*, 8 M. & W. 269.

**INSOLVENT.**

1. (*Execution against.*) B., being indebted to C. in the sum of 42*l.*, gave him a bill of exchange, drawn by one P. on and accepted by him B. for that amount. B. afterwards took the benefit of the Insolvent Act, and was discharged from his liability on the bill. In the meantime P. had been sued on the bill by C., and had been arrested on a judgment obtained in that action. B., on his discharge, in consideration of P.'s discharge from custody, gave a warrant of attorney to C. for the amount of the bill, and also of the costs in the action against P., and of certain costs incurred by C. in the Insolvent Court, in opposing B.'s discharge. On application to set aside the judgment and execution on the warrant of attorney, under the 7 Geo. 4, c. 57, ss. 60, 61: Held, that the instrument was invalid as to the amount of the original debt, but that the judgment must remain in force for the amount of the costs, which formed a new consideration for it. (1 C. & M. 30; 1 C., M. & R. 85; 3 P. & D. 356; 7 M. & W. 143.)—*Collins v. Benton*, 9 D. P. C. 905.
2. (*Operation of assignment.*) The assignment made by an insolvent debtor, on filing his petition under the 7 Geo. 4, c. 57, ss. 10 and 40, so fully vests his property in his assignees, that a statement subsequently made by him in his schedule is not admissible in evidence to impeach their title to it.—*Elverd v. Foster*, 9 D. P. C. 922.

**INSURANCE.**

(*Return of premiums on over-insurance.*) An insurance was effected on the 12th of April on a cargo of cotton then at sea, by five several policies, at the rate of 50 guineas per cent.; and on the 13th, news of the vessel's safety having arrived, a further insurance was bonâ fide effected by six different policies, at ten and five guineas per cent. The latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former of itself did not: Held, that the assured were entitled to a return of premium on the amount of the over-insurance, to which the under-writers who subscribed the policies of the 13th of April were to contribute rateably, in proportion to the sums insured by them respectively (the amount of over-insurance to be ascertained by taking into account all the policies); but that no return of premium was to be made in respect of the policies effected on the 12th.—*Fisk v. Masterman*, 8 M. & W. 165.

*(Liability of insurance company for misrepresentation in prospectus—Pleading.)*

The plaintiff declared against the secretary of an insurance company, and alleged the making und publishing of a prospectus stating certain bonuses to have been declared by the rules of the company, and that the secretary had represented that prospectus to contain a true account of the affairs of the company. The declaration, having alleged the breach of several of the rules appointed for the governance of the establishment, averred that the representations of the defendant were false and fraudulent, and that the plaintiff, having been induced by those representations to effect a policy of insurance with the company, and to pay the premiums becoming due upon that policy, he had by means thereof been defrauded and deceived, in effecting the said policy, and in making the said payments thereon; and the said policy of insurance was of much less value to the plaintiff than if the said representations of the defendant had been true in substance and in fact, to wit, 1000*l.* of less value, and by means thereof the plaintiff was likely to lose the whole benefit of his insurance, and the said sums of money so paid by him as premiums for the same: Held to disclose a sufficient cause of action.

To such a declaration the defendant pleaded, that the rules of the society had been and were so duly performed, &c., and the funds of the society had been and were so duly administered, as was necessary for the maintenance and security of the said society, and of such insurances as had been effected: Held ill.—*Pontifax v. Bignold*, 9 D. P. C. 860.

## INTEREST.

*(When recoverable as part of damages—Evidence.)* In January, 1837, a carriage was sold and delivered by the plaintiff to the defendant. In April following, the defendant wrote to the plaintiff as follows:—"The document you have sent me appears to be in the nature of a bill, and being payable to your order, is good in the market; just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself," &c.: Held, that this was some evidence to go to the jury of an agreement to pay for the goods by a bill or note, and therefore that the jury might give interest on the price as part of the damages. (13 East, 98.)—*Davis v. Smyth*, 8 M. & W. 399.

And see JUDGMENT.

## INTERPLEADER ACT.

*(Sheriff's costs.)* If, upon an interpleader rule obtained by the sheriff, the claimant does not appear, and is therefore barred, the sheriff is not entitled to costs against the claimant.—*Jones v. Lewis*, 8 M. & W. 264.

## JOINT STOCK COMPANY.

*(Liability of directors to purchaser of shares—Evidence.)* In order to entitle a party to maintain an action on the case against the directors of a joint stock company for false and fraudulent representations contained in the prospectus and scrip certificates issued by them, it must distinctly appear that he became the purchaser of shares on the faith of such representations. And even though the representations were false, if the directors rested upon a fair and reasonably well-grounded belief that they were true, they are not liable.

A book in the handwriting of an agent of the company, but not shown to have been kept by him in the course of his employment as agent, or to have come to the hands or knowledge of the directors until after he had ceased to be their agent, was offered in evidence for the purpose of fixing them with know-

ledge that the state of the concern (a mine) was other than had been publicly represented by them: Held, not admissible.

Conversations between the former owner of the mine and one of the directors, and between the latter and another of the directors, as to the state and prospects of the mine, prior to the formation of the company, were admitted at the trial, to show *bonâ fides* in the directors: Held, properly received.—*Shrewsbury v. Blount*, 2 Scott, N. R. 588.

#### JUDGMENT.

(*When it is "entered up"—Interest on judgment debt.*) The time of "entering up judgment," within the 1 & 2 Vict. c. 110, s. 17, is the time at which the incipitur is entered in the Master's book. Therefore where the incipitur was entered on the 8th January, in pursuance of the Master's allocatur, for 630*l.*, but upon a subsequent application by the plaintiff for a review of the taxation of costs, the amount was increased to 643*l.*, by which sum the judgment was amended on the 20th May, the date of the judgment being left unaltered: Held, that the plaintiff was entitled to interest on the judgment debt from the 8th of January.—*Fisher v. Dudding*, 9 D. P. C. 872.

JURY. See WRIT OF TRIAL, 1.

#### JUSTICE OF THE PEACE.

(*When liable in trespass—Warrant when sufficient—Necessity of information on oath before justice himself.*) A warrant of apprehension was issued by a justice of peace, which did not recite any information on oath, and it appeared that, in point of fact, the information was not sworn in his presence: Held, that he was liable in trespass. Quære whether a warrant is not totally void which does not recite any information, and which directs an apprehension "to answer all such matters and things as in her Majesty's behalf shall be objected against him by A. B. for an assault committed on" &c. (2 Hale, P. C. 111.)—*Caudle v. Seymour*, 1 G. & D. 454.

And see CERTIORARI, 2; CONVICTION.

#### LANDLORD AND TENANT.

(*Yearly tenancy—Notice to quit.*) A house and appurtenances by a written demise were demised "for one year and six months certain, from the date," at a yearly rent, "payable at the usual periods," with a proviso, "that three calendar months' notice should be given on either side, previous to the determination of the said tenancy." The holding having continued beyond the term of the year and six months, held, that such holding was not a new tenancy, commencing at the end of that period, but a yearly tenancy commencing upon the original entry of the tenant, and that therefore a notice to quit at the expiration of the second year of the holding was good.—*Doe d. Robinson v. Dobell*, 1 C. & D. 218.

2. (*Tenancy from year to year, what amounts to—Stamp.*) The defendant hired apartments of the plaintiff, on the terms contained in the following memorandum:—"I hereby agree (according to our conversation of last evening) to pay you for the occupation of your first floor furnished, from March 4th, 1839, to Sept. 4th, 1839, the sum of 52*l.* 10*s.*: I also agree either to occupy the said rooms from the 4th September to the 4th December, furnished, on the same terms, viz. 26*l.* 5*s.* for the three months, or take them unfurnished at the rate of 84*l.* per annum:" Held, that this did not create a tenancy from year to year, but was rightly declared on as an agreement to take the apartments furnished for six months, and for a further period of three months, furnished or unfurnished.

The letter above stated was produced by the plaintiff, stamped with a 30s. stamp. The defendant, to explain (as he contended) that letter, put in a second, not stamped: Held inadmissible, since, if it were treated as a separate and independent agreement, it should have had a 30s. stamp; and if the terms of the agreement were to be collected from the two letters, a 35s. stamp would be requisite on one of them.—*Atherstone v. Bostock*, 2 Scott, N. R. 637.

3. (*Right of sale of landlord under distress.*) Where a farm tenant is under covenant not to carry off the premises the hay and straw made on the farm, the landlord, who has seized the hay and straw under a distress, may sell it, subject to a condition that the purchaser shall consume it on the premises.—*Abbey v. Petch*, 8 M. & W. 419.

And see MORTGAGOR AND MORTGAGEE, 1.

LIBEL. See COSTS, 2.

LIEN. See BANKER.

#### LIMITATIONS, STATUTE OF.

(*Exception as to merchant's accounts.*) The exception in the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, as to merchants' accounts, does not apply to an action of assumpsit, but only to the old action of account, or perhaps also to an action on the case for not accounting. (2 Saund. 124; 1 Mod. 70, 269; 2 Mod. 311; 1 Vent. 89; 6 T. R. 193; 8 Bligh, 352.)—*Inglis v. Haigh*, 9 D. P. C. 817.

#### LOTTERY ACTS.

Proceedings for the recovery of penalties relating to lotteries, contrary to the 42 Geo. 3, c. 119 (whether state or private lotteries), must, since the 46 Geo. 3, c. 48, s. 59, be sued in the name of the Attorney-General, and cannot be taken before magistrates.—*Reg. v. Tuddenham*, 9 D. P. C. 937.

#### LUNATIC.

(*Removal of pauper lunatic under 9 Geo. 4, c. 40, s. 38—Estoppel thereby on overseers to deny the chargeability.*) On the application of the overseers of a parish, two justices made an order on them to remove a pauper lunatic to the County Asylum, under the statute 9 Geo. 4, c. 40, s. 38. The order, pursuant to the 41st section of the act, stated that the legal settlement of the pauper was unknown, and directed the expense to be charged to the county. The overseers obeyed the order, and did not appeal against it. Under the 42d section, two justices afterwards inquired into the place of the last legal settlement of the pauper, and adjudged it to be in the parish, the overseers of which had applied for the first order: Held, on the trial of an appeal against such adjudication, that their acts of application for and obedience to the first order, precluded them from saying that the pauper was not chargeable to their parish at the time when they made their application for it.—*Reg. v. Holdsworth*, 1 G. & D. 442.

#### MANDAMUS.

1. (*To registrar of births, to alter entry of birth.*) The Court has no power to issue a mandamus to the registrar of births, &c., under 6 & 7 Will. 4, c. 86, commanding him to erase the entry of a birth, on its appearing that the child was supposititious, and that the entry had been made for fraudulent purposes.—*Exp. Stanford*, 1 G. & D. 428; 9 D. P. C. 927.

And see BASTARDY; DOCK COMPANY; HIGHWAY, 1; ORDER OF REMOVAL, 2; TURNPIKE.

**MARRIAGE.**

(*Action against clergyman for refusal to solemnize—Pleading.*) A declaration in case against a clergyman for not solemnizing a marriage, stated that the plaintiff and Mary B., at the time of the grievance, &c. were desirous to intermarry; that a licence was obtained, authorizing (in the usual form) the solemnization of the marriage, at any time within three months from the date, between 8 and 12 A.M., and reciting that Mary B. had resided at B. for fifteen days next before the date, and that defendant was minister of the church of B.; that by reason of the premises, and by force of the licence, it became the duty of the defendant to solemnize the marriage in the manner and time specified in the licence, when thereunto requested; that the defendant had notice of the licence, and was requested by the plaintiff to solemnize the marriage in the manner and time specified in the said licence, yet the defendant wrongfully and illegally refused.

Held, after verdict for the plaintiff, that the declaration was bad, as the request by the plaintiff alone did not show notice to the defendant that Mary B. was willing to be then married.

*Semble*, per Patteson and Coleridge, Js., the declaration was also bad for not alleging the request to have been made within three months from the date of the licence.

*Semble*, per Williams, J., that the duty to solemnize the marriage in the manner and time specified in the licence was not well laid, as the defendant would be entitled to previous notice.

*Quære*, whether such an action is maintainable at all,—*Davis v. Black*, 1 G. & D. 432.

**MASTER AND SERVANT.**

(*Where servant entitled to recover wages pro ratâ.*) Where a contract for service at a yearly salary is by mutual consent put an end to in the middle of a quarter, the servant may recover salary pro ratâ; but whether he be so entitled or not, is a question for the jury on all the circumstances. (1 Ad. & E. 685; 3 Ad. & E. 171.)—*Lamburn v. Cruden*, 2 Scott, N. R. 533.

And see RESTRAINT OF TRADE.

**METROPOLIS PAVING ACTS.**

Ely Place, part of the liberty of Saffron Hill, Hatton Garden, and Ely Rents, is private property, and though it is generally open to the public during the day, has never been dedicated to the public: Held, that the commissioners for paving Saffron Hill, Hatton Garden, and Ely Rents, had no authority to enter for the purpose of paving it, under 5 Will. 4, c. 18, s. 44, which empowers them at all times to pave, &c. all the squares, streets, lanes, courts, ways, footways, or carriage ways, passages and places within the liberty.—*Paul v. James*, 1 G. & D. 316.

**MONEY HAD AND RECEIVED.**

1. (*Against stakeholder.*) On the sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer, as agent for the purchaser, and by the vendor's attorney, who subscribed himself as "agent for the said S. S. (the vendor)." The purchaser paid a deposit to the attorney, who gave him a receipt, signed by himself, as "agent for S. S." The sale went off through the vendor's default: Held, that the purchaser could not bring an action for money had and received against the attorney, to recover back the

deposit, for that he was not a stakeholder, but merely the agent for the vendor, and payment to him was payment to the vendor.—*Bumford v. Shuttleworth*, 11 Ad. & E. 626.

2. (*To recover back money paid under threat of legal proceedings.*) Pending an action of ejectment on the demise of A. against B., A. is served with notice of B.'s intention to sue for certain statutable penalties incurred by A. An arrangement is made, under which the action of ejectment is discontinued, and B. receives from A. 50*l.* towards the costs of B.'s defence in that action. A. may recover back the 50*l.* as money received by B. to A.'s use, if the 50*l.* is found to have been paid with reference to, and by the coercion of, the threatened penal action, and not to have been paid voluntarily, and with reference to the action of ejectment only.

So, although the arrangement contain terms to be performed, and which are performed, by B., the performance of which prevents B. from being restored to his original position, otherwise than by the intervention of a Court of Equity.—*Unwin v. Leaper*, 1 Man. & G. 748.

3. (*To recover back money deposited conditionally with secretary of Railway Company.*) A dispute having arisen as to whether the plaintiff was entitled, in respect of 200 shares, to be registered as a shareholder in a railway company, it was arranged, between him and the company, that he should deposit 400*l.* on account of such shares with the defendant, who was at that time the secretary of the company, which sum was to be repaid if the plaintiff failed to make out his claim. The following minute of the transaction was made by the defendant:—

“26th April, 1838, E. C. R. Company. Memorandum.—Mr. J. B. has deposited with me the sum of 400*l.* on account of 200 shares, for which he claims to be registered, on condition that Mr. B. is to accept back the money so deposited if he cannot substantiate, to the satisfaction of the board of directors, his claim to be registered for the same.” (Signed) “J. C. R., secretary.”

The 400*l.* being paid to the defendant in a cheque, the defendant paid it into his banker's, on his private account. The defendant quitted the employment of the company in February 1839. The plaintiff never was registered in the books of the company as a shareholder:

Held, first, that the action, which was an action of assumpsit for money had and received, and which was not commenced until more than two years after the money was so deposited, was rightly brought against the defendant; and secondly, that the plaintiff was entitled to recover the 400*l.* without showing that he ever attempted to substantiate his claim to be registered as a shareholder:

Semble, that the plaintiff might have immediately abandoned his claim to be registered, and have sued for the money.—*Baird v. Robertson*, 1 Man. & G. 981.

#### MORTGAGOR AND MORTGAGEE.

1. (*Interest of mortgagor—Notice to quit by.*) During the continuance of a tenancy from year to year, the landlord mortgaged the premises to secure the payment of an annuity: the mortgage deed contained a proviso, that he should remain in receipt of the rents until sixty days after default made in payment of the annuity: Held, as against the tenant, that before default the mortgagor had a sufficient interest in the premises remaining in him, to entitle him to determine the tenancy by a notice to quit. (3 Bing. N. C. 508.) *Doe d. Lyster v. Goldwin*, 1 G. & D. 463.
2. (*Computing principal and interest due on mortgage.*) Where a mortgagee died on the 20th April, interlocutory judgment having been signed on the 17th, in



Easter term, the Court refused, on application in Trinity term, to grant a rule for referring it to the master. to compute principal and interest on the mortgage deed.—*Pitt v. Parker*, 9 D. P. C. 1059.

#### MUNICIPAL CORPORATION ACT.

1. (*Compensation to corporate officer—Jurisdiction of Treasury thereon.*) If a corporation refuse compensation to a removed corporate officer, on the ground that they had removed him for cause sufficient, the Lords of the Treasury have no jurisdiction to try the question of the sufficiency; and though after entertaining that question, and determining it in favour of the claimant, they also adjudicate upon the proper amount of compensation, this Court will not enforce, by mandamus, the payment of such compensation, nor try, upon the return to a writ of mandamus, the sufficiency of the cause, the claimant being bound in the first instance to proceed against the corporation by mandamus, to compel them to restore him, or give him compensation for removal.

Semble, that to justify the removal of a corporate officer, there must be misconduct specially in the execution of his office, and that misconduct in duties which he has performed for the corporation, but which are not necessarily any part of his official duty, it is not sufficient. (10 Ad. & E. 386.)—*Reg. v. Mayor of Newbury*, 1 G. & D. 388.

2. (*Election of aldermen.*) Where the councillors of a borough did not, immediately after the first election of aldermen, appoint who should go out of office in the year 1838, as required by 5 & 6 Will. 4, c. 76, s. 25, but delayed such appointment until the 29th October, 1838: Held, that such delay vitiated the election of the aldermen chosen to succeed the aldermen so appointed to go out of office.—*Reg. v. Alderson*, 1 G. & D. 429.

And see ADVOWSON; BEER ACT.

#### NOTICE OF ACTION.

In an action for imprisoning the plaintiff on a charge of felony, under the 7 & 8 Geo. 4, c. 29, s. 44, in pulling down part of a house and selling the materials: Held, that the defendant was within the protection of the 75th section, and entitled to notice of action, if he bonâ fide thought he was acting in furtherance of the act; and that whether he did so think or not was a question for the jury. (9 B. & C. 803.)—*Rudd v. Scott*, 2 Scott, N R. 631.

NOTICE TO QUIT. See MORTGAGOR AND MORTGAGEE, 1.

#### ORDER OF REMOVAL.

1. (*Order quashed, when final between parties.*) Where the sessions have discharged an order of removal on the ground of a material variance between the settlement stated in the pauper's examination and the settlement proved at the trial, the decision is upon the merits, and final, so that a second order of removal cannot be made upon a second examination, stating the facts correctly: Held, therefore, where an order of removal had been made upon a settlement by renting a tenement as stated in the pauper's examination from 1827 to 1828, and the sessions had discharged the order on its appearing that the renting was from 1828 to 1829, that a second order of removal could not be made upon another examination, stating the dates correctly.—*Reg. v. Inhabitants of Clint*, 1 G. & D. 245.
2. (*Statement of grounds of appeal—Mandamus.*) A ground of appeal was stated to be, that the respondent parish acknowledged the pauper to be an inhabitant of

and legally settled in their parish, by relieving him and his family, during the last six years, out of the parish, and particularly during the years 1839 and 1840, while he and his family resided at Liverpool: Held to be sufficiently explicit, the facts stated being more within the knowledge of the respondents than of the appellants.

The Court of Queen's Bench will issue a mandamus to hear an appeal, if the sessions have refused to hear it upon an erroneous decision as to the sufficiency of the grounds of appeal. (7 Ad. & E. 423; 8 Ad. & E. 399.)—*Reg. v. Justices of Carnarvonshire*, 1 G. & D. 423.

#### OVERSEER.

(*Appointment of.*) Where the justices met in petty sessions in due time after the 25th of March, pursuant to the 54 Geo. 8, c. 91, to appoint overseers, and in consequence of a difficulty as to certain appointments, they adjourned the consideration of those appointments to a day more than fourteen days after the 25th of March; an appointment with respect to those parties, on the day of adjournment, was held good.—*Reg. v. Sneyd*, 9 D. P. C. 1001.

And see LUNATIC; PLEADING, 13.

OYER. See PLEADING, 7.

PILOT ACT. See CONVICTION, 2.

#### PLEADING.

1. (*Effect of admission on record—Onus of proving consideration for bill.*) Assumpsit against the drawer of a cheque. Plea, that it was drawn and delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration. Replication, that it was delivered to the plaintiff for a good consideration. Issue thereon: Held, that the illegal drawing of the cheque was so admitted on these pleadings, as to throw on the plaintiff the onus of proving the consideration. (2 M. & W. 642; 3 M. & W. 179.)—*Bingham v. Stanley*, 1 G. & D. 237.
2. (*Indebitatus assumpsit for money lent, when maintainable in case of special contract.*) The plaintiff lent the defendant money, and received from the defendant shares in a company as a security, and agreed to give twenty-one days notice to the defendant before proceeding to compel the repayment of the loan, or of any part thereof, and upon repayment of any part of the loan, to give back a proportionate amount of shares: Held, that after twenty-one days the plaintiff was not bound to declare specially, averring a tender of the shares, but that he might declare in indebitatus assumpsit for money lent. (3 Bing. N. C. 10, 737.)—*Scott v. Parker*, 1 G. & D. 258.
3. (*Plea of payment—Admission in particulars.*) The particulars of the plaintiff's demand, in an action of assumpsit on a bill of exchange, and for goods sold and delivered to the amount of 42*l.* 5*s.*, then gave credit for a bill of 36*l.* 8*s.*, and to the balance of 5*l.* 17*s.* added a further sum of 10*l.* 18*s.* for goods, and to the amount of the two sums (16*l.* 15*s.*) added the amount of 36*l.* 8*s.*, "for the bill mentioned in the declaration, and indorsed by the defendant:" Held, that the defendant could not avail himself of the transfer of the bill to the plaintiff without an appropriate plea, as the two items in the particulars, with respect to the bill, destroyed each other, so that there was no admission of payment.—*Green v. Smithies*, 1 G. & D. 395.

4. (*Several counts.*) *Semble*, where, on summons to strike out one of the several counts, as founded on the same subject matter of complaint, the judge, being satisfied, on cause shown by the plaintiff, allows both counts, on the ground that it is intended to establish a distinct matter of complaint under each, and the plaintiff succeeds at the trial on an issue arising out of one only of the counts so allowed, if the judge at nisi prius certifies, under Reg. Gen. Hil. 4 Will. 4, r. 7, that it was not *bonâ fide* intended to establish distinct matter of complaint on the several counts, the certificate will deprive the plaintiff of all the costs of the cause.

Held, where there are three counts, and on summons to strike out the first or second, they are allowed to stand, on the ground of the plaintiff's intention to establish a distinct complaint under each, if the plaintiff at the trial succeeds on the second and fails on the first and third, a certificate under rule 7, that he did not intend to establish a distinct matter of complaint "in respect of either of the counts on which he has failed," is inoperative, because it does not apply to the two counts in respect of which the summons was taken out.

After trial and judge's certificate, it is too late to object to an order allowing two counts, that it was improperly made, because the counts were in apparent violation of rule 5.—*Dewar v. Swabey*, 11 Ad. & El. 913; 1 G. & D. 397.

5. (*Bill of exchange—Indorsement in blank—Departure.*) Declaration by indorsee against the acceptor of a bill of exchange, drawn by R. and by M., and by M. indorsed to the plaintiff. Plea, that there was no consideration for the drawing or accepting of the bill, or for the indorsements. Replication, that the indorsement by M. was in blank, and that, after such indorsement, X., who then appeared to be, and whom plaintiff believed to be, the lawful holder of the bill, delivered it to the plaintiff for value and without notice: Held, on special demurrer, that the replication was not a departure, and was good in confession and avoidance of the plea. *Semple*, that the plea was bad on special demurrer, for not alleging that plaintiff gave no consideration for the bill. (4 Ad. & El. 270.) —*Arbouin v. Anderson*, 1 G. & D. 403.

6. (*Condition precedent.*) To an action on a banker's draft for 250*l.*, the defendant pleaded, that before the making of the draft, the defendant, as executor of R. S., was lawfully entitled to a bond for 500*l.*, part of the effects of R. S., which bond was in the possession of the plaintiff, who refused to deliver the same to the defendant; that the plaintiff and divers other persons claimed to be entitled to legacies under the will of R. S., but the amount payable to them was then unascertained: and, therefore, before the making of the draft, it was agreed between the plaintiff and defendant that the plaintiff should deliver up the bond to the defendant, and that the defendant should give the plaintiff the draft declared on, as security for the payment of the legacies, and that the plaintiff should receive the 250*l.* upon and subject to an express condition, contained in a certain writing then signed by the plaintiff, that the legatees should authorize the plaintiff to receive it; that the draft was given and received subject to that condition; and that the legatees never had authorized the plaintiff to receive the 250*l.*; Held, on special demurrer, assigning for cause, among others, that it did not sufficiently appear by the plea that the authority to be given by the legatees was to be a condition precedent to the payment of the draft, that the plea was a good answer to the action.—*Spencer v. Spencer*, 2 Scott, N. R. 520.

7. (*Bill of exchange—Release—Oyer.*) In an action by the payee against the

acceptor of a bill of exchange, the defendant pleaded, that before the bill became due, and whilst the plaintiff was the holder thereof, and before the commencement of the action, the plaintiff released the bill, without alleging that the release was after the acceptance : Held bad.

An instrument set out upon oyer must be read as forming part of the declaration (or other pleading), in which profert has been made of such instrument.—*Ashton v. Freestun*, 2 Man. & G. 1 ; 2 Scott, N. R. 273.

8. (*Condition subsequent, what is—Avowry for rent charge devised to feme covert.*)

A rent charge was devised to A. so long as her conduct and behaviour met with the approbation of J. S. The discreteness of the conduct and behaviour of A., and the approbation of J. S., are conditions subsequent, compliance with which need not be averred in a plea alleging the continuance of the rent charge.

An avowry for rent charge devised to A. the wife of B., may be made by B. and A. in the right of A.

So although the rent charge issue out of a term of years : *semble*.—*Wynne v. Wynne*, 2 Man. & G. 9 ; 2 Scott, N. R.

9. (*What is sufficient traverse.*) In an action by indorsee against a remote indorser of a bill of exchange, the defendant pleaded that he was induced to indorse the bill by the fraud, covin, and misrepresentation of the plaintiff and two others of the indorsers, and other persons in collusion with them. The replication traversed the alleged fraud, covin, and misrepresentation : Held good on special demurrer.—*Daniels v. Coombe*, 2 Scott, N. R. 597.

10. (*Effect of matter alleged under a videlicet.*) The plaintiff declared that theretofore, *to wit*, on the 31st May, 1835, by an agreement in writing then made, the defendant's testator contracted, *inter alia*, within two years from Midsummer *then next*, to build certain houses ; assigning for breach that the houses, at the time of the commencement of the action (in 1839), were unbuilt, contrary to the tenor and effect of the agreement : Held bad, on general demurrer, on the ground that it was not distinctly shown that two years from Midsummer next after the making of the agreement had elapsed before the commencement of the suit.—*Parkinson v. Whitehead*, 2 Scott, N. R. 620.

11. (*Leave and licence.*) The plaintiff, being possessed as assignee of a lease of certain premises, agreed to convey the same to the defendant, and to pay rent, rates, and taxes, up to a certain day ; and the defendant agreed, from and after that day " to pay, bear, and discharge the rent and all rates, taxes, and outgoings payable in respect of the premises, and to indemnify and save harmless the plaintiff, his heirs, &c., and his and their lands, &c. of, from, and against the rent and covenants reserved and contained in such lease as aforesaid, and of and from all loss, costs, damages, and expenses which they might incur, sustain, or be put unto by reason of the non-payment of such rent, or non-performance of such covenants." The defendant entered into possession, but the legal interest was not conveyed to him ; and by reason of this default, certain goods of the plaintiff which were on the premises were distrained for rent and taxes. In an action for this breach of the indemnity, the declaration stated that " divers goods and chattels of the plaintiff were in and upon the demised premises *with the leave and licence of the defendant*, and were liable to be seized and taken, and afterwards were lawfully seized and taken, as distresses for arrears of rent due under the said indenture, in respect of the said demised premises, and sold." The defendant pleaded, " that no goods or chattels of the plaintiff were at any time

in or upon the said premises in the declaration mentioned *with the leave and licence of the defendant*, nor was any part of *such goods lawfully* seized and taken as and for the distresses, or sold or disposed of as therein alleged : Held, that the only material part of this issue was the fact of seizure and sale as distresses : which being found by the jury, the plaintiff was entitled to a verdict.—*Groom v. Bluck*, 2 Scott, N. R. 665.

12. (*Pleading not guilty by statute.*) Where, in an action of trespass for hunting over the plaintiff's land, the defendant pleaded not guilty by statute, the Court, on an affidavit of the plaintiff that he could not discover the statute under which the defendant meant to justify, made absolute a rule upon the defendant, to point out within three days the statute under which the plea was pleaded, or else that the words "by statute" should be struck out of the margin.—*Coy v. Lord Forester*, 8 M. & W. 312 ; 9 D. P. C. 770.

13. (*Vesting of lease in overseers—Averment of seisin—Express colour.*) Trespass for breaking and entering a dwelling-house of the plaintiff, and evicting him therefrom, &c. Plea, that before and at the said time when &c., the Marquis of H. was seised of and in the said dwelling-house in his demesne as of fee, and being so seised, he, before the said times, when &c., to wit, on &c. demised the same to the then churchwardens and overseers of the poor of the parish of A., and their successors, to hold to them and their successors for and on behalf of the parish for one whole year, and so on from year to year, &c. ; by virtue of which demise the then churchwardens and overseers entered and became possessed, and the churchwardens and overseers and their successors for the time being have been thenceforth, by virtue of the premises, and of the statute in such case made and provided, possessed of and in the said term &c. ; that afterwards, and before the said times when &c., to wit, on, &c., the said dwelling-house then being vested in the churchwardens and overseers on behalf of the parish, and then being a tenement provided at the charge of the parish for the habitation of the poor thereof, one M. S., then being a poor person, had been permitted by the churchwardens and overseers for the time being to occupy the said tenement, and from thence until and at the time of making the complaint thereafter mentioned, remained in possession thereof, and *had refused and neglected to quit the same*, and deliver up possession to the churchwardens and overseers of the poor of the said parish, within one month after a certain notice and demand in writing for that purpose, signed by the churchwardens and overseers of the poor of the said parish, which had before then been delivered to the said M. S., the said M. S. then being and continuing in such occupation under and by virtue of the said permission at the time of such delivery.

The plea then stated the preferring of an information by one of the overseers against M. S. before a justice pursuant to the statute, the issuing of a summons thereon, the delivery of the summons to M. S. seven days before the day appointed for the hearing, the neglect of M. S. to appear, and averred that upon proof of the delivery of the summons, the justices proceeded to determine the matter of complaint, and adjudged the same to be true ; it then alleged the issuing of a warrant to cause possession of the premises to be delivered to the churchwardens and overseers, pursuant to stat. 59 Geo. 3, c. 12, which was delivered to the defendant A. to be executed ; by virtue of which, in order to deliver peaceable and quiet possession thereof to the said churchwardens, &c., he the defendant A., and the other defendant as his servant and by his command, afterwards and within a reasonable time after the adjudication, and after the delivery of the said warrant, to wit, at the time in the introductory part of the plea mentioned,

the same being in the day-time, broke and entered the said dwelling-house; and because the plaintiff and his family were then occupying the same, the plaintiff claiming some title thereto under colour of a certain charter of demise, pretended to be thereof made to him by the said M. S. for the term of his natural life, after her said refusal and neglect, whereas nothing passed thereby, and although the plaintiff and his family were then requested so to do, refused to depart and go out of the said tenement, the defendants then gently ejected, expelled, put out, and removed the plaintiff and his family from the said tenement, for the purpose of delivering the peaceable and quiet possession thereof to the said churchwardens and overseers, &c.:—and so justified the trespasses complained of: Held, on special demurrer, first, that the seisin in fee of the Marquis of H., at the time of the demise to the churchwardens and overseers, was sufficiently averred.

Secondly, that the churchwardens and overseers are not, by 59 G. 3, c. 12, s. 17, made a complete body corporate, but are only empowered “to accept, take, and hold in the nature of a body corporate,” and therefore that it was not necessary to show the acceptance of the demise by an instrument under a common seal. (8 East, 38; 4 M. & W. 704.)

Thirdly, that it was no objection that the names of the then churchwardens and overseers were not mentioned, as the grant would be good by the name of office to the then individual officers.

Fourthly, that the express colour given by the plea, by the averment of the charter of demise, was sufficient; for that it gave a colour of title, though it was a bad one.—*Smith v. Adkins*, 8 M. & W. 362.

14. (*Liberum tenementum, construction of.*) On a plea of *liberum tenementum* to an action for a trespass to a close named in the declaration, the defendant is entitled to a verdict, if he establish a title to *that part* of the close on which the trespass was committed, and is not bound to prove a title to the *whole* close. (1 B. & C. 489; 5 B. & Adol. 395; 2 B. & C. 918; 2 B. & Adol. 99.)—*Smith v. Royston*, 8 M. & W. 381.

15. (*Replication de injuriâ.*) Indorsee against acceptor of a bill of exchange. Plea, that after the indorsement to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to W., and from thence until, and at, and after the commencement of the suit, was, and still is, the indorsee and holder thereof. Replication, *de injuriâ*. Held, that the plea was not in excuse, but in denial, of the breach alleged in the declaration, and therefore that the replication *de injuriâ* was improper. (1 M. & W. 65; 4 M. & W. 123.)—*Schild v. Kilpin*, 9 D. P. C. 803.

16. (*Frivolous plea.*) To an action by payee against maker of promissory note, the defendant pleaded, that there was no consideration for the note, and that it was made subject to the condition that the defendant should not be called on to pay it if he were not able, but that it should be renewed. On affidavit that the plea was false, the Court allowed the plaintiff to sign judgment.—*Mitford v. Finden*, 9 D. P. C. 813.

17. (*Plea, when not sufficiently certain as to time.*) Assumpsit for 163l. 16s., the amount of rent claimed to be due for the use and occupation by the defendant of apartments in the plaintiff's house, for one year, at a certain weekly rent, from 25th February, 1839, to 24th February, 1840. The defendant pleaded, as to so much of the rent as accrued due before and on the 27th July, 1839, payment: Held, that the plea was uncertain, the period between the 25th February and



27th July, 1839, being twenty-one weeks and five days; and that the words "and on" could not be rejected, so as to make the plea applicable only to the period of twenty-one weeks.—*Dunn v. Di Nuovo*, 9 D. P. C. 841.

18. (*Varying contract under seal by parol agreement.*) The plaintiff declared in covenant, and the declaration alleged the making of a lease in the lifetime of J. W., of whom the plaintiff was surviving executor, by which certain premises were demised to the defendant for a term, covenants being contained in the instrument to repair and maintain all erections and improvements on the demised premises, and to surrender and yield up the premises with all such improvements, &c., being well and sufficiently maintained, &c.; the breach alleged the making of a green-house which was an erection and improvement on the premises, and its removal before the yielding up of the premises. The defendant pleaded that he assigned the premises to one J. T. B., who assigned them to J. P., who assigned them to W. H., and that it was agreed between the testator and the said W. H., and the said testator then promised the said W. H., that if he would make and set up a certain improvement, to wit a green-house, in and upon the demised premises, he should be at liberty to pull down and remove the same; replication, *de injuriâ*. At the trial of the cause, the jury returned a verdict for the defendant on the issue, but assessed conditional damages to the plaintiff. Upon motion for judgment non obstante veredicto: held that the plea was ill, as setting up a parol agreement to vary a contract under seal.—*West v. Blakeway*, 9 D. P. C. 846.

19. (*Several counts.*) The plaintiff declared as secretary to the Commercial and Steam Packet Company, and in the first count of his declaration alleged, that in consideration of the company supplying the defendant with a steam vessel for hire, to go where he and his friends pleased, the defendant undertook and promised, while the steam vessel was so let to hire to him, that he would take due and proper care thereof, and not use the same in any illegal or unlawful manner, or for any illegal or unlawful purpose; yet the defendant, disregarding his said promise, afterwards and whilst the said steam vessel was so let to hire to him, did not take due and proper care thereof, &c., but used the same for raising and levying war and insurrection and rebellion against the King of the French. The second count alleged that an agreement was entered into between the plaintiff and defendant, by which the former agreed to provide a steam vessel for the use of the defendant, for one month, &c., and the latter agreed not to detain the same from him for more than one month; it then alleged that the steam vessel having been supplied, the defendant detained the same for a long space of time, to wit, 100 days beyond the month, &c.

Held, that those counts were not in violation of the rule of H. T., 4 W. 4, which provides that several counts shall not be allowed unless a distinct subject matter of complaint is intended to be established in respect of each.—*Bleaden v. Rupallo*, 9 D. P. C. 857.

20. (*General issue by statute.*) A defendant cannot give special matter in evidence under the plea of not guilty, by virtue of any statute, without having inserted the words, "by statute," in the margin, in compliance with the rule of T. T., 1 Vict., not without the provisions in the 3 & 4 W. 4, c. 42, s. 1.—*Bartholomew v. Carter*, 9 D. P. C. 896.

21. (*Several pleas—Certificate under 4 Ann., c. 16, s. 5—Costs.*) Where issues on special pleas have been found for the plaintiff, the judge at the trial may still certify under the 4 Ann. c. 16, s. 5, that the defendant had probable ground for



pleading those pleas, and the master may, notwithstanding the rule of H. T., 4 W. 4, s. 7, tax the defendant the costs of those issues under such certificate. (8 Ad. & E. 606.)—*Fry v. Monckton*, 9 D. P. C. 967.

22. (*Plea in abatement—Affidavit of verification.*) Semble, that under the 3 & 4 W. 4, c. 42, s. 8, the affidavit verifying a plea in abatement for the nonjoinder of a co-contractor, must state the actual residue of that party at the time of making the affidavit.—*Wheatley v. Golney*, 9 D. P. C. 1019.

23. (*Time, when material—Videlicet.*) The day on which it is alleged, in a declaration in trespass for mesne profits, that the plaintiff was ejected, and that on which possession was recovered by him, are not material, although they be not stated under a videlicet.—*Ive v. Scott*, 9 D. P. C. 993.

And see **BILLS AND NOTES**, 1, 3, 4; **CARRIER**; **CHARTERPARTY**, 1, 2; **HUSBAND AND WIFE**; **INFERIOR COURT**; **MARRIAGE**; **RESTRAINT OF TRADE**.

**POOR LAWS' AMENDMENT ACT.** See **BASTARDY**.

### PRACTICE.

1. (*Motion for altering verdict, when too late.*) Where a verdict has been found for the plaintiffs on two or three issues, and for the defendant on the third, a motion for a rule to enter the latter for the plaintiff is too late, unless obtained within four days of term next succeeding the trial.—*Deacon v. Stodhart*, 2 Scott, N. R. 557.

2. (*Judgment as in case of nonsuit.*) It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff, who has been proceeding both at law and in equity in respect of the same matter, has, under an order obtained in equity, at the defendant's instance, been put to his election, and elected to proceed in equity. (2 Anst. 568.)—*Johnstone v. Friedman*, 2 Scott, N. R. 584.

3. (*New trial.*) Where a new trial is granted *ex debito justitiæ*, the party is not bound to proceed upon the rule within any limited time.—*Earl of Harborough v. Shardlow*, 8 M. & W. 265.

4. (*In scire facias—Notice of motion for judgment of default of appearance.*) A notice of motion for leave to sign judgment on a scire facias was left with a person at a house at H., who stated herself to be the defendant's housekeeper, that the defendant was somewhere in London, and that she could not account for his absence, except that he was concealing himself in order to avoid his creditors: Held sufficient.—*Dixon v. Thorold*, 8 M. & W. 297; 9 D. P. C. 827.

5. (*Appearance, form of.*) An appearance entered by the plaintiff for the defendant is irregular, if it omit the words "according to the statute," as prescribed by the Uniformity of Process Act.—*Codrington v. Curlewis*, 9 D. P. C. 968.

6. (*Judgment as in case of nonsuit.*) Judgment as in case of a nonsuit may be obtained in ejectment, if issue has been joined, and the tenant has appeared and pleaded, although, through the default of the lessor of the plaintiff, no consent rule has actually been drawn up.—*Doe d. Williams v. Smith*, 9 D. P. C. 1011.

7. (*Signing judgment for want of plea.*) Where it is doubtful whether sufficient notice has been given to the defendant of the filing of the declaration, the plaintiff must sign judgment for want of a plea at his peril, and the Court will not assist him by giving him leave to take such a proceeding.—*Spriggins v. White*, 9 D. P. C. 1000.

8. (*Rule to compute.*) A rule nisi having been granted to set aside an interlocutory judgment, with a stay of proceedings, the Court refused to make a rule to compute on such judgment absolute.—*Anderson v. Southern*, 9 D. P. C. 994.

#### PRACTICE IN REVENUE CASES.

(*Transfer of action to Exchequer.*) An action brought in another Court against a revenue officer for the value of goods seized by him for a breach of the revenue laws, will be removed into the Exchequer, on the application of the Attorney-General, at any stage of the proceedings.

And the affidavit in support of such application was held to be properly intitled as between the Attorney-General and the plaintiff in the action, proceedings having been commenced for the condemnation of the goods, although no information had yet been filed in this Court. (1 Anst. 205, n.)—*Attorney-General v. Kingston*, 8 M. & W. 163.

#### PRISONER.

1. (*Discharge of, under 48 G. 3, c. 123.*) Service upon one of several plaintiffs of the defendant's intention to apply for his discharge under the 48 Geo. 3, c. 123, s. 1, is sufficient for a rule absolute in the first instance.—*Harris v. Turtle*, 8 M. & W. 258 ; 9 D. P. C. 803.
2. (*Charging in execution.*) A plaintiff is not bound to charge the defendant in execution, under the 85th rule of H. T., 2 W. 4, until he has been in custody for the prescribed period at his suit. (Tidd, Pr. 361.)—*Hall v. Wetherell*, 2 Scott, N. R. 196.
3. (*Discharge of, under 48 G. 3, c. 123.*) On motion for the discharge of a prisoner under the 48 G. 3, c. 123, s. 1, the Court will not grant even a rule nisi, unless the gaoler's signature to the certificate of the defendant's commitment be verified by affidavit.—*Clare v. Macmoran*, 2 Scott, N. R. 524
4. (*Discharge of, under 48 G. 3, c. 123.*) On an application to discharge a prisoner out of custody under this statute, he cannot be allowed to show by affidavit, that although the verdict in the action was for a sum exceeding £20, the debt had, in fact, been reduced below that amount before action brought.—*Curtis v. Rickards*, 9 D. P. C. 845.

#### PROCESS.

1. (*Amendment of ca. sa.—Scire facias.*) A plaintiff signed judgment in an action of debt, and took the defendant in execution by a ca. sa., which was in form for damages recovered on promises. After a lapse of a year and a day from the judgment, the defendant having applied to set aside the execution, the Court allowed the plaintiff to amend the writ without a scire facias. (1 C., M. & R. 831 ; 1 D. P. C. 501.) Quære, whether a defendant in execution can make successive applications to set aside proceedings on different grounds of objection, all of which were discoverable at the time of the first application.—*Bicknell v. Wetherell*, 1 G. & D. 460.
2. (*Setting aside writ of summons—Form of rule.*) A rule to set aside the copy of a writ of summons is nugatory : the motion should be to set aside the service, or the copy and service. (8 D. P. C. 231 ; 5 M. & W. 605 ; 1 Man. & G. 426.)—*Gedge v. Bishop*, 2 Scott, N. R. 203.
3. (*Distringas, when set aside.*) The Court will not set aside a distringas, though the affidavits on which it issued be manifestly insufficient, in not disclosing the circumstances from which it was inferred that the defendant kept out of the way

to avoid service, unless it be distinctly sworn on his part that the place at which the attempts to serve him were made was not at the time the place of his abode, or that he did not keep out of the way to avoid service of the writ.—*Jones v. Nash*, 2 Scott, N. R. 598.

4. (*Distringas to outlawry.*) The Court will not grant a distringas for the purpose of outlawry, where no attempt has been made to serve the writ of summons at the defendant's last place of residence, although it should be unknown; no endeavour having been made to discover it.—*Nugee v. Swinford*, 9 D. P. C. 1038.
5. (*Non-existence of original writ of ca. sa., irregularity only.*) The omission to sue out an original writ of ca. sa., before issuing a testatum ca. sa., is an irregularity only, which must be taken advantage of promptly.—*Warne v. Haddon*, 9 D. P. C. 960.

And see EXECUTION.

### RAILWAY ACT.

1. (*Construction of—Liability of company to make good roads across railway.*) By 6 W. 4, c. 14, s. 29, the Birmingham and Gloucester Railway Company were authorized, subject to the restrictions of the act, to make across the railway such roads "as they should think proper."

By sect. 41, when any part of any road, either public or private, should be cut through, raised, sunk, "taken," or so much injured by the company as to be impassable or inconvenient, the company, before any such road should be cut through, raised, &c., were to cause another road to be set out and made instead thereof, as convenient as the said road cut through, raised, &c., or as near thereto as might be; and where the road cut through, raised, &c., should be a turnpike road, the substituted road, if temporary, was to be set out and made, and the principal road to be restored, within six months after the commencing the operation.

By s. 47, where any bridge should be erected for carrying any turnpike road, public highway, or occupation road, over the railway, the road over such bridge was not to be less than fifteen feet.

A mandamus, reciting that the company had, in November, 1838, (after a compulsory power given to the company of taking land had expired,) cut through and taken part of a turnpike-road, which was forty feet wide, and had made a bridge thereon for carrying it over the railway, the said bridge and the approaches (which were about 150 yards long on either side of the bridge) being about thirty-six feet wide only, commanded the company to restore the turnpike-road according to the said act.

The company returned—1. That they had not "cut through and taken" the said part of the turnpike-road within the meaning of the act. 2. That the company had judged it necessary to erect the bridge to carry the road over the railway, and had made the bridge of a greater width than required by the act. 3. That it was necessary, in consequence of [the erection of such bridge, to make approaches also, and that they had made the approaches as convenient to the public as they could be made, in execution of the powers of the act, and as convenient to the public as the original road was. 4. That they were not authorized to injure any house, unless specified in the schedule of the act or omitted by mistake, without consent, and that they could not obey the writ without injuring houses neither specified nor omitted by mistake. 5. That they could not obey the writ without taking more land, and that their compulsory power

to take land had expired before they were required by the trustees of the road to widen it.

Held—1. That section 41 was not confined to the case of a turnpike-road becoming impassable by the works of the company, and of a temporary road being substituted during such interruption, and that they had “taken” the road within the meaning of the section.

2. That the return was bad; and a peremptory mandamus was issued, commanding the company to restore the approaches to their former width.—*Reg. v. Birmingham and Gloucester Railway Company*, 1 G. & D. 324.

2. (*Construction of—Liability of company to make good roads across railway.*) By 6 W. 4, c. cxi., s. 93, the Manchester and Leeds Railway Company had a general power to make the railway, and also to divert and sink such roads as they should think proper, subject to the restrictions of the act.

By section 38, 7 W. 4, c. 24, (an act enabling them to vary their line,) they were authorized to carry their railway over a turnpike-road by means of a bridge thirty feet wide, and to lower the turnpike road on each side of the bridge, with a specified inclination, and to give a certain headway underneath and to relay and reform the road.

The turnpike-road, consisting of a carriage-way of thirty feet, and two paths of six feet each, was forty-two feet wide. The company made a bridge of the required width, they also lowered the carriage-way of the road, but left the footpaths at their original level.

On the trial of several traverses to a return to a mandamus, commanding the company to lower the road to the whole width of forty-two feet and reform it, the jury found—1. That the company had not so lowered the road. 2. That the company had reformed the road as directed by the act. 3. That the carriage-road and footpaths, as made by the company, were more commodious to the public than if the whole road had been lowered to its full width of forty-two feet.

A peremptory mandamus was issued, notwithstanding the finding on the two last issues.—*Reg. v. Manchester and Leeds Railway Company*, 1 G. & D. 338.

3. (*Construction of clause imposing tolls.*) Where the language of an act of parliament obtained by a company imposing a rate or toll upon the public is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favourable to the public.

Where, therefore, an act of parliament contained a clause authorizing a railway company to demand a rate not exceeding 4d. per mile upon all coals carried along the railway, and a subsequent clause directing that for all coals shipped for exportation a rate not exceeding ½d. per ton per mile should be charged, it was held that the second clause was to be read as an exception engrafted on the first; and also that coals shipped for London were coals shipped for the purpose of exportation. Where an act of parliament directed that a railway company should take a lower rate of tonnage upon goods conveyed by the railway and shipped in the port of A., goods shipped at a place within the legal port of A., but at some distance from the town of A., were (under the circumstances) held to be entitled to the benefit of the reduction, though the act had previously spoken of “the port and town of A.”—*Barrett v. Stockton and Darlington Railway Company*, 2 Man. & G. 134; 2 Scott, N. R. 337.

4. (*Construction of—Right of occupiers of severed lands to cross railway.*) By the 183d section of the Grand Junction Railway Act (3 Will. 4, c. xxxiv.) it is enacted, that the owners and occupiers of lands through which the railway

should be made ("except in cases in which the company should, at their own expense, have made communications from the land on the one side of the railway to the land on the other side thereof, according to any agreement with any owner or occupier thereof, or according to the provisions of the act,") at all times for the purpose of occupying the said land, without payment of toll, might pass and repass directly over and across such parts of the railway as should be made in or upon their respective lands. The 186th section prohibited all persons, except the company and their servants, from crossing the railway, "except only directly crossing the same at places to be appointed for that purpose, for the necessary occupation of the respective lands through which the said railway should pass." And by the 180th section, in case of dispute, the company are to make such communication as two or more justices of the peace shall, upon the application of any owner, &c., judge necessary and appoint: Held, that until the company had made a communication, the owners of several lands had a right to cross the railway at any part within their respective lands.—*Grand Junction Railway Company v. White*, 8 M. & W. 214.

5. (*Liability of, as carriers.*) A parcel was delivered, at Lancaster, to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Junction Railway Company were known to be proprietors of the line only as far as Preston, where the railway unites with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston: Held, that the Lancaster and Preston Railway Company were liable for its loss.—*Muschamp v. Lancaster and Preston Junction Railway Company*, 8 M. & W. 421.

And see CORONER'S INQUISITION.

RAILWAY SHARES. See CONTRACT OF SALE, 4.

#### RECOVERY.

(*Amendment of.*) Lands, of which a recovery was intended to be suffered, lay in the several parishes of A. and B. in the county of M. The parish of A. only was mentioned in the record of the recovery; but in the deed to make a tenant to the præcipe and to lead the uses of the recovery, "all the lands of the recoveree in the parish of A., in the county of M., and all other her lands in the said county," were conveyed.

The Court refused to amend the recovery, on the ground that the omission of the parish of B. was cured by the 8th section of the act for abolishing fines and recoveries, (3 & 4 Will. 4, c. 74.)—*Heming, demandant, &c.*, 1 Man. & G. 879.

#### REFORM ACT.

(*Liability for expenses at poll.*) By the 2 Will. 4, c. 45, s. 68, it is enacted, that at every contested election, &c. the returning-officer shall, if required thereto by or on behalf of any candidate, on the day fixed for the election, and if not so required may, if it shall appear to him expedient, cause to be erected, for taking the poll at such election, different booths, &c. And the 71st section provides, "that all booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates:" Held, that the "contested election," referred to in the 68th section, is the poll, and the candidates referred to in the 71st, are candidates who go to or demand a poll. Therefore

where a candidate was put in nomination, but afterwards declined going to the poll: Held, that he was not liable to any part of the expenses of erecting booths, &c.—*Muntz v. Sturge*, 8 M. & W. 302.

**REGISTRAR OF BIRTHS.** See **MANDAMUS**.

**RELEASE.** See **PLEADING**, 7.

**RENT-CHARGE.** See **PLEADING**, 8.

**REPLEVIN BOND.**

1. The condition in a replevin bond, for prosecuting the suit with effect, means the prosecuting it to a not unsuccessful termination.

In a declaration in an action on a replevin bond, the breach assigned was, that the defendant did not appear at the next County Court, and then and there prosecute his suit with effect: Held, that the breach was not well assigned, it being consistent therewith that the suit might have been begun at the next County Court, and be still pending.

Semble, that the words "then and there," usually inserted in the conditions of replevin bonds, are not proper.—*Jackson v. Hanson*, 8 M. & W. 477.

2. (*Setting aside—Staying proceedings on.*) Where a replevin bond was taken in a penalty greater than the amount of the goods distrained, and with a clause in the condition to indemnify the sheriff for granting the replevin, and it appeared that the bond had been executed in September, and assigned in February, but no application to set it aside was made till Easter term, the Court refused to set it aside, but intimated that it was objectionable that the bond should be taken in such an amount.

The terms on which the Court will stay proceedings on a replevin bond at the instance of the sureties, are, the payment of the appraised value of the goods, if less than the amount of rent due, the double costs, and the costs of the application.—*Miers v. Lockwood*, 9 D. P. C. 975.

3. Where it appeared that on an execution in an action on a replevin bond, a greater sum had been indorsed on the writ and levied, than that to which the plaintiff was entitled, which had been paid over to the plaintiff, the Court will not, at the instance of the sheriff or of a second execution creditor, compel the plaintiff to refund the overplus.—*Bowser v. Lloyd*, 9 D. P. C. 1029.

**RESTRAINT OF TRADE.**

- (*When valid—Master and servant—Pleading.*) The declaration set out a contract, whereby the plaintiff agreed to employ the defendant in his service, and the defendant agreed to serve the plaintiff in his business, for one month certain, and until the expiration of a month's notice, to be given by either party: in consideration whereof the defendant did thereby agree, that he would not, during the continuance of such service, nor within the space of twenty-four months after quitting or being discharged from the same, commence, &c. the business of a cow-keeper within five miles from Northampton-square, in the county of Middlesex; and if at any time during such service, or within twenty-four months after the determination thereof, the defendant should commence, &c. such business, that he would pay 10s. for every day that he should act contrary to the agreement. The declaration then averred, that the defendant entered into the plaintiff's service, and continued therein until, &c. when he quitted and was discharged from the same; and although the plaintiff had always performed and fulfilled the agreement in all things therein con-

tained to be performed on his part, yet the defendant did not perform the said agreement, &c. stating the breach to be, that the defendant did commence, &c. such business within the specified time and space.

Plea, that the plaintiff did not give to the defendant, nor the defendant to the plaintiff, a month's notice in writing, to determine the contract and service, concluding with a verification.

On demurrer to this plea, it was held bad.

Held also, that the general allegation of performance of the agreement by the plaintiff in the declaration, was sufficient on general demurrer; and also, that if the defendant had been improperly discharged by the plaintiff, such wrongful discharge was no answer to the action, but would be merely the subject of a cross-action.

Held, further, that the agreement was valid, being limited both in time and space, and not appearing to be an unreasonable restraint of trade.—*Proctor v. Sargent*, 2 Man. & G. 20; 2 Scott, N. R. 289.

SCIRE FACIAS. See PRACTICE, 4.

### SESSIONS.

1. (*Power of, as to costs of appeal.—Highway Act.*) The quarter sessions have no power to make a general order for the costs of an appeal, though they may refer the taxation of the amount to their officers, provided they during the sessions adopt his decision, and incorporate it in the order. This rule is equally applicable, whether the sessions have a discretion to award costs or not. The nonpayment of the costs awarded by an order of the quarter sessions, on the trial of an appeal against the stoppage of a highway, under the stat. 5 & 6 Will. 4, c. 50, s. 90, is not an offence forming a subject for a conviction under the 101st and 103rd sections of that statute, but the nonpayment of them may be enforced by a distress warrant, issued by two justices under the 103rd section, grounded directly on the order of sessions.

Such a distress warrant is bad, if it do not show on the face of it an order of sessions for the payment of a specific sum as costs.

*Quære*, whether any property passes to a purchaser by a sale under a distress warrant so defective.—*Sellwood v. Mount*, 1 G. & D. 358; see also *Lock v. Sellwood*, id. 366, note.

2. (*Power of, as to costs of appeal.*) The recorder, at a municipal sessions, may, on ordering costs on an appeal, refer the taxation of the amount to an officer of the Court, but such taxation must be adopted by him during the continuance of the same sessions. An order for such costs, founded on a subsequent adoption, is invalid.—*Reg. v. Long*, 1 G. & D. 367.

See BEER ACT; CERTIORARI, 2; HIGHWAY, 1.

### SETTLEMENT.

- (*By coming to settle on tenement.*) Pauper applied to take a tenement. The owner refused to let unless another person became joint-tenant with him. On this the two became joint-tenants at 17*l.* a year. Pauper entered upon and occupied the tenement exclusively, and paid all the rent for some years: Held, the demise being to him and another, and the rent only 17*l.* a year, that he had not gained a settlement under 13 & 14 Car. 2, c. 12. (5 B. & Adol. 971; 2 Bott, P. L. 194, 197.)—*Reg. v. Inhabitants of Aberdaron*, 1 G. & D. 178.



**SHERIFF.**

1. (*Liability of, for non-execution of writ.*) Judgment had been signed for the plaintiff in an action of ejectment. The lessor caused to be issued and delivered to the sheriff a writ of habere facias. He then made an appointment with the sheriff for the purpose of executing the writ. The sheriff having been informed by the defendant's attorney that the proceedings were irregular, and would be set aside, did not execute the writ. The judgment was afterwards set aside, on an affidavit of merits: Held, that the lessor of the plaintiff was entitled to recover, in an action on the case against the sheriff, the costs he had incurred in preparing to assist the sheriff to execute the writ.—*Mason v. Paynter*, 1 G. & D. 381.
2. (*Attachment, staying proceedings on.*) The proceedings on an attachment against the sheriff for not returning a writ of venditioni exponas were stayed on terms, although the attachment was strictly regular, and the sheriff in contempt, and the application was made after a return to the fieri facias, in which the value of the goods seized was not stated.—*Reg. v. Sheriff of Hertfordshire, in Dod v. Coleman*, 9 D. P. C. 916.

**STAMP.**

(*Evidence of a contract, what is.*) In an action for board and lodging supplied to an illegitimate child of the defendant, letters of the defendant, containing promises to remit money to the plaintiff, and making excuses for not having done so, were held not to require an agreement stamp as being "evidence of a contract," within the meaning of those words in the Stamp Act, 55 Geo. 3, c. 184, Sched. Part 1, tit. Agreement. (1 Man. & G. 417, 559.)—*Beeching v. Westbrook*, 8 M. & W. 411.

And see AFFIDAVIT, 3; ATTORNEY, 5; LANDLORD AND TENANT, 2.

**STOPPAGE IN TRANSITU.**

A cargo of 80 quarters of wheat was shipped in London, on the 6th December, 1839, on board a vessel bound to Barmouth and Tremadoc, and by the bill of lading, was to be delivered at the port of Barmouth and Tremadoc to L. T., or to his assigns, on his paying freight, &c. The cargo was paid for by L. T. partly in cash, partly by his acceptance at two months. On the 28th January, 1840, L. T. by deed assigned all his estate and effects to the plaintiff and A. B., in trust for the benefit of themselves and his other creditors. L. T. was at that time insolvent, to the plaintiff's knowledge. The bill of lading was indorsed by L. T. to the plaintiff as follows (the indorsement being without date):—"I do hereby order that Captain J. do deliver the possession of the within-mentioned quantity of wheat to Mr. R. J. [the plaintiff], being one of my assignees, to be disposed of as he may think proper." On the 4th February, the vessel arrived at Barmouth with the wheat on board, and the plaintiff there went on board and took samples, and sold 70 of the 80 quarters, for which he paid the freight, and they were delivered to the purchasers: and he directed the master to take forward the remaining 10 quarters to Tremadoc. On the 9th February, L. T.'s acceptance became due and was dishonoured, and on the 10th the shippers gave notice to the captain, at Barmouth, not to deliver the wheat, but to hold it to their use. On the 23rd, the vessel arrived at Tremadoc, where the plaintiff demanded the remaining 10 quarters, tendering the freight, but the master refused to deliver it.

Held, that under these circumstances, (even supposing the plaintiff to be in the same situation as L. T.) the right of stoppage in transitu was determined, as to the whole of the cargo, by the acts done by the plaintiff at Barmouth.

*Semble*, that if the composition deed contained a release to L. T., the plaintiff was an indorsee for value of the bill of lading, and no right of stoppage in transitu therefore existed as against him.—*Jones v. Jones*, 8 M. & W. 431.

TRESPASS. See PLEADING, 14, 23.

### TROVER.

(*Damages in action for unstamped instrument.*) In trover for an unstamped memorandum, whereby the defendant agreed to guarantee to the plaintiff payment "for half the amount of fixtures, say about 100*l.*," which the defendant withheld from the plaintiff, having erased his own signature, the jury gave a verdict for 100*l.* The Court refused to grant a new trial on the ground that the paper, being unstamped, was worthless, and the plaintiff therefore entitled only to nominal damages.—*M'Leod v. M'Ghie*, 2 Scott, N. R. 604.

And see HERRIOT.

### TURNPIKE.

(*Liability of trustees to make fences—Mandamus.*) Where the trustees of a turnpike road have formed a new road through private grounds, but have neglected to make proper fences, as required by the statute 4 Geo. 4, c. 95, s. 66, the want of the necessary funds for that purpose is not a sufficient answer to a mandamus commanding them to make the fences.—*Reg. v. Trustees of Luton Roads*, 1 G. & D. 248.

### USE AND OCCUPATION.

(*When debt maintainable for.*) Debt will lie for use and occupation, though there be an express demise, if it be not by deed.—*Gibson v. Kirk*, 1 G. & D. 252.

VAGRANT ACT. See CONVICTION, 1.

WARRANT. See COURT OF REQUEST, 1, 2; JUSTICE OF THE PEACE, .

### WARRANT OF ATTORNEY.

1. Where a trader gave a warrant of attorney to secure payment of a specific debt, and the creditor sought to enforce the security against the debtor's goods for subsequent advances made by him, the Court, at the instance of the assignees of the debtor, set aside such proceedings, notwithstanding the affidavit of the creditor that the warrant of attorney was intended to cover subsequent advances also.—*Bell v. Tidd*, 9 D. P. C. 949.

2. (*Attestation of.*) The attestation by the clerk of an attorney who is acting for both parties in the transaction (the clerk himself being an admitted attorney) is insufficient.—*Durrant v. Blurton*, 9 D. P. C. 1015.

WARRANTY. See CONTRACT OF SALE, 3.

### WATERCOURSE.

(*Case for obstruction of—Pleading.*) In case for an injury to the plaintiff's reversionary interest by the defendant's obstruction of a watercourse on his land, and thereby sending water upon and under the house and land in the occupation of the plaintiff's tenant, the defendant pleaded, that the obstruction was caused by the neglect of the plaintiff's tenant to repair a wall on the demised land, that in consequence it fell into the watercourse, and caused the damage, and that within a reasonable time after the defendant had notice he recovered it: Held to be a bad plea, it not showing any obligation on the tenant to repair the wall merely as terre-tenant. *Quære*, whether it would have been good if it had.—*Bell v. Twentyman*, 1 G. & D. 223.

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v. Wedderburn, M. & C. 585; see S. C.  
M. & C. 41.

See PRACTICE, 10.

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## EQUITY.

[Containing Cases in 10 Simons, Part 3, and 4 Mylne & Craig, Part 3.]

**ACCOUNT.** See **PRACTICE**, 1.

### **ADMINISTRATION.**

(*Apparent defect.*) A diocesan administrator is entitled *prima facie* to maintain a suit as representative, unless it appears very clearly that the administration ought to have been a prerogative one or in another diocese. In this case the plaintiff claimed, by virtue of a diocesan administration, as representative of one of the next of kin of an intestate, whose estate had required a prerogative administration, and a demurrer was overruled.—*Beadles v. Burch*, S. 332.

### **ADMINISTRATION OF ASSETS.**

(*Injunction.*) Executors having, to an action brought by a creditor, pleaded the decree in an administration suit, which plea was held bad by the Court of Law, and judgment given for the plaintiff, the Court restrained the latter from proceeding against the assets of the testator, but would not deprive him of any right at law the judgment might give him against the executors personally, who ought, as the Court said, to have applied for an injunction when the action was brought.—*Burles v. Popplewell*, S. 383.

And see **EVIDENCE**.

**ALIEN.** See **APPEALS ON REPORTED CASES**; **COPYRIGHT**.

**ANNUITY.** See **WILL**, 2, 3.

### **BANKRUPTCY.**

1. (*Apparent ownership.*) *Quære*, whether the share of a concern after sale by a bankrupt is to be considered in his order and disposition, by reason only of the business being carried on for a limited time, and for a special purpose not pecuniary, in the name of the old firm, the bankrupt taking no part in the management.—*Bannatyne v. Leader*, S. 350.

2. (*Fraudulent preference—Moral pressure.*) The solicitation by a son that his father would execute an assignment for securing a sum due on bond to the trustees of the son's marriage settlement, held sufficient to rebut the objection of voluntary and fraudulent preference, the contemplation or probability of bankruptcy not being sufficiently proved, and the ground of apparent ownership, upon which the case also rested, being doubtful.—S. C.

And see **WILL**, 7.

### **CONCURRENT SUITS.**

(*Allowed under circumstances—Scotch law.*) Where plaintiffs had obtained a decree for account against defendants, some of whom resided in Scotland, and had property there, and the plaintiffs brought actions against them there for

the same demand, but for the purpose only, as it was alleged, of preventing the alienation of their property pending the suit, which, according to the Scotch law, could be done by writ of inhibition and arrestment granted upon the summons being issued, the Court held that the plaintiffs might proceed so far in their actions as should be necessary for obtaining in that way security to answer, what, if any thing, might be found due to them on the taking of the account in the suit here.—*Wedderburn v. Wedderburn*, M. & C. 585; see S. C. 1 Beav. 759; L. M., No. 48; and 4 M. & C. 41.

CONSTRUCTION OF ORDERS. See PRACTICE, 10.

CONSTRUCTION OF STATUTES. See HEIR.

### COPYRIGHT.

(*Alien.*) *Semble*, that an alien friend has copyright in a work composed abroad, if first published here.

The defendant did not defend an action directed for trial of the right.—*Bentley v. Foster*, S. 329.

COSTS. See PATENT; PRACTICE, 2.

### DISCOVERY.

(*Action at law.*) The authority of *Irving v. Thompson*, 9 Sim. 17, L. M. No. 47, deciding that discovery in aid of a defence to an action could not be given against persons not parties to the action, followed and approved of by the Lord Chancellor on appeal.—*Kerr v. Rew*, S. 370.

### EXECUTOR.

(*Liability on lease.*) Where the testator was assignee of a leasehold, of which the yearly value had become less than the rent, an order directing the executors "to take such steps as might be necessary to put an end to all liability on the testator's estate in respect of such lease,"—and a subsequent order declaring that they had not used due diligence in carrying out the first order, and referring it to the master to state when they might with due diligence have put an end to the liability,—were on appeal confirmed with costs; the Lord Chancellor treating it as clear law, that the liability on the testator's estate would have ceased by an assignment; and holding that the executors were bound to effect such assignment if possible, and that it did not appear that they had used any endeavours for that purpose, alleging as their excuse the impropriety and immorality of getting rid in that way of the liability of their testator.—*Rowley v. Adams*, M. & C. 534.

FRAUD. See SOLICITOR.

### HEIR.

(*Devise to—Marshalling—3 & 4 Will. 4, c. 106.*) Under the third section of this act a devise to the heir gives him all the rights of a devisee, and accordingly assets will not be marshalled against him in favour of a pecuniary legatee.—*Strickland v. Strickland*, S. 374.

### HUSBAND AND WIFE.

(*Separate use—Settlement.*) A woman being under her father's will absolutely entitled to property to her separate use, afterwards marries, when part of the property is settled to her separate use for life, then in trust for her husband if he survived her, subject to a power in her to dispose of it by will, but in trust

for her absolutely if she survived: Held, that this settlement left untouched the separate use created by the will as to the remainder of the property.—*Newlands v. Paynter*, S. 377.

INFANT. See MORTGAGE, 1.

## INJUNCTION.

1. (*Breach of.*) A party who has been restrained by injunction from doing a particular act, as cutting wood, is guilty of a breach if present, aiding and abetting, while others are doing it.—*St. John's College v. Carter*, M. & C. 497.
2. (*Legal right—Delay of trial.*) Although generally, where a party has obtained an injunction in support of an alleged legal right, as one under a patent, which is afterwards to be established at law, the Court will compel him to proceed to trial within a reasonable time, yet the Court refused an order for plaintiff to go to trial within twenty-one days, eighteen months after the date of the injunction, there having been supineness also on the part of the defendant, and the plaintiff having been long in possession.—*Bickford v. Skewes*, M. & C. 498.

And see ADMINISTRATION OF ASSETS.

## INTERPLEADER.

(*Legal and equitable demands.*) A party may be protected by interpleading suit against demands, one of which is equitable and the other legal.—*Crawford v. Fisher*, S. 479.

## JOINT STOCK COMPANY.

1. (*Parties—7 Geo. 4, c. 46.*) Held, that under the above act, and without the benefit of the 1st and 2d Vict. c. 96, a joint stock company might in equity sue by their public officer members of the company jointly with strangers.—*Manners v. Rowley*, S. 470.
2. (*Special relief—Parties.*) The supposed rule that the Court will not entertain a suit as to partnership matters, unless it seeks a dissolution, is one that admits of exception. Accordingly, where a bill was filed by some members of an insolvent joint stock company on behalf of themselves and all other the members, except the defendants, against the directors and the trustees and public officers of the company, and against certain shareholders who had not paid their calls, and who, it was alleged, were the *only* shareholders who had not done so, the prayer of the bill being only for an account of the partnership assets and for a receiver, and that the whole might be got in, converted and applied in payment of the partnership debts; a demurrer for want of parties and for want of equity, by reason, as to the latter ground, of the limited relief prayed for, having been allowed by the Vice-Chancellor, was overruled by the Lord Chancellor, who repeated his observations made in *Ware v. Malachy*, 1 M. & C. 559, L. M., No. 35, and in *Taylor v. Salmon*, 4 M. & C. 134, L. M. No. 48, as to the duty of the Court to adapt its procedure to the altered circumstances of the times, and who thought in this case that it was a good reason for omitting to pray for a dissolution, that it would have been necessary in that case to make all the shareholders parties, which in the case of so numerous a partnership could not be done.—*Wallworth v. Holt*, M. & C. 619.

JURISDICTION. See CONCURRENT SUITS; MORTGAGE, 1; PATENT.

## LEASEHOLD.

(*Liability of assignee.*) The Lord Chancellor treated it as clearly settled by the

case of *Wolveridge v. Steward*, 1 Crom. & Mee. 644, that the assignee of a lease gets rid of his liability by assigning it again.—*Rowley v. Adams*, M. & C. 534.

And see EXECUTOR.

#### LEGACY DUTY.

(*Evidence of payment.*) Under the 36 Geo. 3, c. 52, s. 27, a copy of the entry in the books of the commissioners of stamps is evidence of payment of the legacy duty for all purposes, as for the purpose of proving that the executors had assets, but such copy must be proved in the regular way, by a witness who has compared it with the original.—*Harrison v. Borwell*, S. 380.

MARSHALLING. See HEIR.

#### MORTGAGE.

1. (*Foreclosure—Motion—Infants.*) Where the equity of redemption of a term was vested in A. as the administrator of his father, although his children, who had an interest in it, were infants, and could not admit the title of the mortgagee in a proceeding under 7 Geo. 4, c. 20, the Court held that, independently of that statute, A. being administrator and responsible for any undue admission, it might in a foreclosure suit, on motion made by A. admitting the balance due, make an order to the same effect as a decree.—*Grane v. Mitchell*, S. 484.
2. (*Production of mortgage deed—Costs.*) It was held, upon a question raised as to the costs of a foreclosure suit, that the mortgagee was not bound until payment of principal and interest to produce his mortgage deed to the devisee of the mortgaged estate, though requested to do so by the latter for the purpose of ascertaining the amount due, and the other particulars of the security. The authority of *Anon. Mosley*, 246, doubted; and the case of *Latimer v. Neate*, 4 Clark & Fin. 570, L. M., No. 40, explained by reference to the pleadings.—*Browne v. Lockhart*, S. 420.
3. (*Sale with condition of repurchase.*) Where there was a conveyance apparently by way of sale, subject to a right of repurchase given by a distinct instrument, which was not shown to have been executed at the same time, though admitted to have been so within a few days, it was held to be a mortgage, though the consideration money was nearly the full value, and the defendant had paid the expenses of the conveyance, and had been immediately let into possession. (See *Sevier v. Greenway*, 19 Ves. 413.)—*Williams v. Owen*, S. 386.

PARTIES. See SOLICITOR.

PARTNERSHIP. See JOINT STOCK COMPANY.

#### PATENT.

(*Costs of caveat.*) The Court has jurisdiction to give a patentee the costs occasioned by an unsuccessful caveat, but such costs will be as between party and party only.—*Re Cutler's Patent*, M. & C. 510.

#### PAYMENT INTO COURT.

(*Doubtful title.*) Defendant, who was trustee, admitted by his answer possession of the money, but did not know whether plaintiff filled the character in which he claimed, viz. that of heir at law. Order of the Vice Chancellor, refusing motion for payment into Court, affirmed with costs.—*Doubless v. Flint*, M. & C. 502.



## PLEADING.

1. ("Agreement"—"Understanding.") Where plaintiff in stating part of his bill stated an *agreement*, but afterwards *charged* that there was an *understanding*, this was taken as an admission that there was no agreement, and a demurrer was allowed.—*Morris v. Morgan*, S. 341.
2. (*Multifariousness*.) Where a party had a right of account against A. and B. in respect of the same transaction, and a right of lien as against A. for what might be found due, a bill seeking to enforce the right to account against both and the lien against A., was held clearly not multifarious.—*Manners v. Rowley*, S. 470.
3. (*Plea—Charge of documents*.) Where the plaintiff sued as administrator, and it was pleaded that he was not, it was held not necessary to deny by answer the usual charge as to documents.—*Fry v. Richardson*, S. 475.
4. (*Revivor—Impertinence*.) It is not impertinent for an answer to a bill of revivor, although admitting the right to revive, to state facts subsequent to the original answer, qualifying the right to relief, as it existed at the filing of the original bill, as that the defendant had become bankrupt and obtained his certificate.—*Langley v. Fisher*, S. 345.

## PRACTICE.

1. (*Accounts on motion*.) The fifth Order of May, 1839, enabling the Court to direct certain inquiries before the hearing, does not authorize the taking of accounts upon motion, where the principal relief asked is the account, as in an administration suit.—*Lee v. Shaw*, S. 369.
2. (*Advancing cause*.) The costs of a motion to advance a cause, under the 4th Order of May, 1839, ordered to be paid by plaintiff. (But see *Carthew v. Barclay*, 10 Sim. 273; L. M. No. 53.)—*Browne v. Lockhart*, S. 420.
3. (*Appeal—Enrolment*.) The enrolment of a decree or order will not be stopped by an appeal, if the order for setting down the appeal is not served before the enrolment is made.—*Dearman v. Wych*, M. & C. 550; see S. C. 9 Sim. 570; L. M. No. 51.
4. (*Commission to examine—Imperfect order*.) An order for a commission to examine, returnable on a day subsequent to that to which publication then stood enlarged, with liberty to apply to the master further to enlarge publication, held irregular.—*Maund v. Allies*, M. & C. 503.
5. (*Conduct of suit*.) Where the prosecution of a creditor's suit had, under the 56th Order of 1828, been taken from the plaintiff and given to another creditor, the plaintiff's solicitor was ordered to allow the solicitor of such creditor to inspect and take copies of all papers in the cause.—*Bennett v. Baxter*, S. 417.
6. (*Contempt*.) A defendant in contempt for want of answer cannot refer the bill for impertinence, unless such order of reference be both obtained and served at least the day before an attachment is sealed against him.—*Petty v. Lonsdale*, M. & C. 545.
7. (*Demurrer—Leave to amend*.) After a demurrer for want of equity, and also for want of parties, had been overruled as to the first ground, but allowed as to the second, with leave to amend, against which order the defendants appealed, but before the appeal came on the plaintiff amended the bill, to which the defendants demurred again both for want of equity and for want of parties, but continued to prosecute their appeal; the Lord Chancellor dismissed such

appeal with costs, observing, that the proper course for the defendants would have been to obtain an order restraining the plaintiff from amending before the appeal, and that the plaintiff having used the liberty given her by the discretion of the Court, should not be put to the expense of filing a new bill for the purpose of raising a question which might be tried, as it was in fact, upon the demurrer to the amended bill. See *Vernon v. Vernon*, 2 M. & C. 145. Observations upon the proper form of an order on demurrer for two grounds, where it is allowed on one ground and not upon the other.—*Wellesley v. Wellesley*, M. & C. 554.

8. (*Demurrer—Commission to examine.*) Where on demurrer bill fails as to the relief asked, which in this case was for an injunction to restrain proceedings at law, it fails also as a bill for a commission to examine.—*Morris v. Morgan*, S. 341.
9. (*Exception—Reference back.*) The Court does not, by allowing an exception stating not only that the master ought not to have reported as he has, but how he ought to have reported, intend to adopt the conclusion suggested by the exception, but to refer the whole matter back.—*Livesey v. Livesey*, S. 331.
10. (*Plea—Costs.*) Under the 31st Order of 1828, when a plea to the whole bill is argued and allowed, the plaintiff, though he undertakes to reply, must pay the costs of the plea, the other costs of the suit being reserved.—*Fry v. Richardson*, S. 475.
11. (*Revivor and supplement.*) On the death of a sole defendant, plaintiff filed a bill of revivor and supplement against his heir, executor, and devisee, who were three distinct persons, but did not obtain an order to revive. A motion on behalf of the three defendants, that the plaintiff might revive within a week, or the suit be dismissed, was refused, because the devisee, against whom the bill was only one of supplement and not of revivor, was joined in it.—*Folland v. Lamotte*, S. 486.
12. (*Sale under decree.*) Where one of the defendants refuses to execute a conveyance settled by the master under an order for that purpose, the purchaser should apply for an order upon such defendant, and not for an order on plaintiff to procure his concurrence.—*Stillwell v. Mellersh*, S. 367.
13. (*Supplemental answer—Dismissal.*) A supplemental answer cannot be excepted to without leave, and in the absence of any application for such leave, it is to be deemed sufficient from the time of filing it, and the two months after which, under the 16th amended Order of 1828, the defendant may move to dismiss for want of prosecution, begin from the time of filing the supplemental answer.—*Barnes v. Tweddle*, S. 481.

And see **DISCOVERY ; PRODUCTION OF DOCUMENTS, 2 ; SALE UNDER DECREE.**

## PRODUCTION OF DOCUMENTS.

1. (*Letter to witness.*) Letters from the defendant's solicitor to a person who was examined as witness for the defendant in an action relating to the matters in the suit, though described by the answer as written subsequently to the institution of the suit, and for the purpose of the defence in it : Held, not privileged from production.—*Mayor and Corporation of Dartmouth v. Holdsworth*, S. 476.
2. (*Place of production.*) The Court has no jurisdiction, even against a receiver, to order, except by consent, documents to be produced at any other place than at the master's office, or with the clerk in court.—*Maund v. Allies*, M. & C. 503.

3. (*Receiver and plaintiff.*) Where a plaintiff is appointed receiver, he will not on that account be ordered to produce documents belonging to him as plaintiff. In this case, however, where the plaintiff, who was made receiver, was the managing partner, he was ordered to show such parts and entries in the partnership books as related to his receipts as receiver.—S. C.

And see MORTGAGE, 2; PRACTICE, 5.

#### RECEIVER.

- (*Contested will.*) Pending a contest in the Ecclesiastical Court as to the validity of two wills, where the party propounding the latter will also claimed under an assignment to him by the testatrix, which the other party filed a bill to set aside; the Lord Chancellor, referring to the case of *Wills v. Rich*, 2 Atk. 285, discharged an order for appointing a receiver which had been made by the Vice Chancellor.—*Jones v. Goodrich*, S. 325. (See S. C., *infra*, Ecclesiastical Digest, ADMINISTRATION.)

And see PRODUCTION OF DOCUMENTS, 2, 3.

#### SALE UNDER DECREE.

1. (*Non-concurrence of parties.*) Where an estate has been sold under a decree, and all proper parties have been ordered to join in the conveyance to be settled by the master, if a party to the suit whom the master considers a proper party to the conveyance refuses to convey, the purchaser should move for an order upon him directly, and not that the plaintiff should procure him to convey.

But it might be otherwise if possession was required to be obtained by means of writs which the plaintiff alone would be entitled to.—*Stillwell v. Melleish*, M. & C. 581.

2. (*Order for resale.*) An order for resale, made in consequence of purchaser's default in payment of his money, ought not to discharge him from his purchase, the resale being the realization of a lien, leaving it to the purchaser to make up the deficiency, if any. (See *Saunders v. Gray*, and *Tanner v. Radford*, reported in note.)—*Harding v. Harding*, M. & C. 514.

SCOTCH LAW. See CONCURRENT SUITS.

#### SOLICITOR.

- (*Fraud—Party.*) It is quite clear that a solicitor who has aided his client in a fraud which the Court is asked to set aside, may be made a party to such suit, costs being prayed against him on demurrer.—*Beadles v. Burch*, S. 332.

#### TITHES.

- (*Timber.*) Held, by the Lord Chancellor, upon a full review of the cases, that trees of the growth of twenty years and upwards, sprung from the roots or stools of old trees formerly cut down, were within the exemption given by the 45 Edw. 3, c. 3, to trees described as *gros bois*.—*Loxon v. Pryse*, M. & C. 600.

TRUST. See WILL, 9.

TRUSTEE. See PAYMENT INTO COURT.

#### VENDOR AND PURCHASER.

1. (*Condition.*) One of the conditions of sale was, that if the purchaser should raise objections, which the vendor was unwilling or unable to remove, he the vendor should be at liberty to rescind the contract: Held, that this condition applied only to the first delivery of objections, and that it was waived by the vendor's consenting to answer them.—*Tanner v. Smith*, S. 410.

2. (*Partial defect of title.*) Where the vendor had no title to a small portion of the land contracted for, but such defect was not discovered till after the contract, and the vendor was in possession of such portion, and the materiality of it to the enjoyment of the rest was in question, the Court refused, with costs, a motion by the purchaser to be discharged from his contract.—*Chamberlain v. Lee*, S. 444.

And see SALE UNDER DECREE.

## WILL.

1. (*Construction—Accumulation.*) Testator directed the proceeds of his estate to be invested and accumulated till the youngest child of his brother should attain twenty-one, and then to be in trust for all the children who should then be living, or their issue. All the children except the second in age died without issue before the youngest if living would have attained twenty-one: Held, that the second, who had attained twenty-one, was entitled to the fund in possession upon the death of the last of the other survivors who died under twenty-one.—*Evans v. Pilkington*, S. 412.
2. (*Construction—Annuity.*) Held, that an annuity given *de novo* out of personal estate, without words of limitation, was a perpetual annuity.—*Tweedale v. Tweedale*, S. 453. (But see *Blewitt v. Roberts*, next case.)
3. (*Same.*) Testator bequeathed to his wife an annuity of 600*l.* for her life, and after her death to be equally divided between six persons, or the survivors or survivor of them, and he gave to the same six persons 100*l.* per annum each during their lives, with power to leave their annuities to their wives or children, but in case of their dying without exercising such power, then to the survivors or survivor. The annuities were all issuing out of personalty: Held, by the Vice Chancellor, that all the above annuities were perpetual; but his decision was reversed by the Lord Chancellor.—*Blewitt v. Roberts*, S. 491.
4. (*Construction—Charge of debts.*) Testator, after expressing an intention to dispose of all his property, directed his just debts and funeral expenses to be paid by his executor thereafter named, and then, after giving several pecuniary legacies, devised all his copyholds, which were his only real estates, to his son J. without words of inheritance, and left all the rest and residue of his estate and effects to his said son, whom he appointed sole executor and residuary legatee, such son being also his heir: Held, that the will was sufficient to pass the fee in the copyholds, and that it charged them with the debts.—*Dover v. Gregory*, S. 393.
5. (*Construction—Condition.*) Testator bequeathed a sum in trust for his daughter (a single woman) for her separate use, independently of any husband she might have, and after death in trust for her children, and if no children, then *if she should survive any husband she might have*, for her absolutely, but if her husband should survive her, then as she should appoint, and in default of appointment for her next of kin. The daughter died unmarried: Held, that she only took a life interest, the apparent intention being to give the corpus only in the event of her marrying.—*Lenox v. Lenox*, S. 400.
6. (*Construction—Cumulative legacy.*) Testator having by his will given sums absolutely to his four sons, and life interests in other sums to his wife and four daughters, afterwards upon the death of one of his sons, to whom 2000*l.* was given by the will, made a codicil in these terms: “In consequence of the death of my son J. T., I have opened my will, and now wish to bequeath to my wife.

600*l.* a year, to my three sons 2000*l.* each, to my four daughters 300*l.* a year each :'' Held, that all the legacies were cumulative.—*Tweedale v. Tweedale*, S. 453.

7. (*Construction—Discretionary trust.*) Testatrix having first by her will given to her nephew a share in a fund for life, afterwards, on his becoming bankrupt and insane, revoked such bequest, and directed the trustees to apply during his life the whole or such part of the interest of the fund at such times, in such proportions, and in such manner, for the maintenance and support of her nephew, and for no other purpose whatsoever, as they in their discretion should think most expedient: Held, that no interest passed to the assignees.—*Twopeny v. Peyton*, S. 487.

8. (*Construction—Next of kin.*) After bequest of residue to testator's daughter for life, with remainder to her children, it was provided that if she should die without leaving issue, 3000*l.* should be paid as she should appoint, and if testator's wife should survive the daughter, and the daughter should die without issue, then he gave 2000*l.* to his wife, and the residue *unto the nearest of kin of his own family for ever*. The daughter, who was the sole next of kin of the testator, survived the wife, and died without issue: Held, that her next of kin were entitled, to the exclusion of her personal representative.

Affirmed by the Lord Chancellor, who observed, that the same person was next of kin of the daughter and of the testator at her death.—*Clapton v. Bulmer*, S. 426.

9. (*Trust for maintenance.*) Testator gave all his property in trust to pay the income to his wife for the support and education of his children, and after her death to be divided among them: Held, that the wife was entitled for life, she maintaining the children.—*Gilbert v. Bennett*, S. 371.

10. (*Construction—Vesting.*) Bequest in trust for A. for life, and after his death in trust to transfer the whole to A.'s children on the day of their attaining twenty-one, in such shares as A. should by deed or will appoint, and in default of appointment, in a certain way among them: Held, that the time of payment was annexed to the gift, and that A. could not by the exercise of his power accelerate the vesting.—*Murray v. Tancred*, S. 465.

#### APPEALS ON REPORTED CASES.

*Du Hourmelin v. Sheldon*, 1 Bea. 79; L. M., No. 46.—Judgment of the Master of the Rolls, that money, the produce of an estate devised to be sold, might be given to an alien,—affirmed. M. & C. 525.

*Wellesley v. Wellesley*, 10 Sim. 256; L. M., No. 53.—The decision of Vice Chancellor, that a covenant to secure an annuity charged subsequently acquired lands, followed by the Lord Chancellor in the same case on demurrer to amended bill. M. & C. 561.

## ECCLESIASTICAL.

[Containing Cases in 2 Curteis, Part 2.]

### ADMINISTRATION.

1. (*Pendente lite.*) Where there was a contest between two wills, the Court refused, on the application of the executor named in the first will, to appoint an administrator *pendente lite* for the purpose of instituting proceedings for the recovery of certain property, alleged to have been fraudulently obtained from the testator, by the person who was named sole executor by the second will. The Court doubting whether they had power to appoint an administrator *pendente lite* for such a purpose, but assuming the jurisdiction to exist, the evidence of jeopardy to the property was not sufficient.—*Goodrich v. Jones*, 453. (Prerog.) See S. C. *Equity Digest*, RECEIVER.
2. (*Scotch law recognized.*) Administration of the estate of a domiciled Scotchman having been granted by the commissary in Scotland to the brother, who under the Scotch law was entitled in preference to the widow, the Court granted to him administration of the effects in England, without citing the widow.—*In the goods of Rogerson*, 656. (Prerog.)
3. (*Surety—Official assignee.*) The rule, that administration will not be granted in derogation of a prior title, without personal service of citation, on those having such prior title, enforced against official assignee of bankrupt intestate.—*Belcher v. Maberly*, 629. (Prerog.)
4. (*Widow—Adultery.*) Administration granted to a son in preference to a widow who had been divorced for adultery. *In the goods of Davies*, 628. (Prerog.)

APPEAL. See PRACTICE, 2.

### BISHOP'S LICENCE.

(*Proprietary Chapel.*) A licence from a bishop to a clergyman, to officiate in a "proprietary chapel," is, like all other such licences, revocable.—*Hodgson v. Dillon*, 388. (Consist.)

### BRAWLING.

Charge of brawling against churchwarden, for forcible interference with the deputy of the organist, dismissed upon the evidence, but without costs.—*Cory v. Byron*, 396. (Arches.)

### CHURCH RATE.

1. (*Discharge—3 & 4 Vict. c. 93.*) Under this statute, authorizing the discharge of a party who has been imprisoned for six months, for non-payment of a rate under 5*l.*, upon payment of the rate, and "the costs lawfully incurred by reason of such custody and contempt" (without an oath of obedience to the lawful commands of the ordinary, which was before required), payment of the costs in the ecclesiastical courts only is required.—*Baker v. Thorogood*, 632. (Consist.)

2. (*Jurisdiction.*) A suit for subtraction of church rate may be removed, like other ecclesiastical causes, by letters of request, from the commissary of the bishop to the Court of Arches.—*Harris v. Pellatt*, 473. (Arches.)
3. (*Jurisdiction under 10l.*) It is not necessary to give jurisdiction to the ecclesiastical courts in cases of demand for rates under 10l., where the validity of the rate is in dispute, that the party should have been first summoned before the magistrates, under 5S Geo. 3, c. 127. (See *Rickett v. Bodenham*, 4 Ad. & Ell. 433.)—*White v. Beard*, 480. (Consist.)
4. (*Partial error—Amendment of libel.*) Where a church rate was bad as to a small portion thereof, as being assessed upon land not in the actual occupation of the rate-payer, under an idea that he was liable as landlord, by a local act and the custom of the parish, the rate was held not to be bad in toto, and the libel was amended by striking out the invalid part. The defendant still persisting in opposing the claim, upon grounds which turned out to be insufficient, was condemned in costs, but only to the amount of 5l.—*Harris v. Pellatt*, 473. (Arches.)
5. (*Resolution—Delay.*) It was held no sufficient objection to the validity of a rate, that it was not drawn up and the heading inserted till some months after the passing of the resolution in vestry, on which it was founded.—*White v. Beard*, 480. (Consist.)
6. (*Trifling inequality.*) Where the value of the rateable property was 8622l., and property to the amount of about 200l. was omitted from the rate: Held, that this was not sufficient to invalidate it, but no costs were given.—S. C.

CLERGYMAN. See BISHOP'S LICENCE.

COUNTY HISTORY. See EVIDENCE, 2.

#### CRIMINAL SUIT.

(*Security for costs.*) The Court will not, in a criminal suit, direct the defendant to give security for costs.—*Woods v. Woods*, 516. (Consist.)

#### DIVORCE.

(*Plea of cruelty.*) Cruelty and adultery allowed to be pleaded by wife in a suit against her, the adultery relied on by her having been condoned, but revived by subsequent cruelty.

The ultimate decision in the cause was against the wife.—*Eldred v. Eldred*, 376. (Pecul.)

DOMICIL. See ADMINISTRATION, 2; MARRIED WOMAN.

EAST INDIA COMPANY. See WILL, 11.

#### EVIDENCE.

1. (*Competency—Effect of retainer.*) Held, that a solicitor who retained the proctor in the suit, but who did not consider that by so doing he became liable for the costs, as to which *quære*, was a competent witness in support of a will.—*Allen v. Macpherson*, 513. (Prerog.)
2. (*County history.*) *Quære*, how far a county history, such as “*Morant's History of Essex*,” is admissible to prove that two places form one parish.—*White v. Beard*, 480. (Consist.)

And see INCEST; WILL, 2, 3, 4, 5.



**EXECUTOR.**

(*Derivative representation.*) The executor of an executor cannot take probate of the will of his testator only, renouncing that of the will of the original testator. — *In the goods of Perry*, 655. (Prerog.)

**INCEST.**

(*Oral evidence—Legitimacy.*) A marriage between uncle and niece, declared null and void, and the parties enjoined from continuing their connexion, but without penance, upon oral evidence of the marriages, establishing the relationship, as well as of that constituting the offence; the Court observing that, even if the evidence was defective, which it was not, the essential in the case was not the legitimacy of the parties, but their nearness in blood. *Woods v. Woods*, 516. (Consist.)

**JURISDICTION.** See **CHURCH RATE**, 3.

**MARRIED WOMAN.**

(*Separate act.*) Held, that a married woman, who was living separate from her husband, and to whom all right to the estate and effects of the deceased intestate had been conveyed by the separation deed, might execute by herself a proxy of renunciation of her right of administration, in favour of the party next entitled. *In the goods of Harding*, 640. (Prerog.)

And see **PRACTICE**, 4.

**PEW RIGHT.**

1. (*Jurisdiction—Local act—Vestry.*) Where a local act (the 51 Geo. 3, c. 151, relative to the new church at Marylebone) gave to the vestry the power of setting out, appropriating, and, with a certain exception, letting seats, "as they should think necessary, proper and convenient," it was held that, though the Ecclesiastical Court had still jurisdiction within the terms of the act, it had not, under the act, any such power to control the discretion of the vestry, as it generally possesses over churchwardens, and that the vestry might, under the act, which excepted only from their power of letting the seats appropriated for the poor, let the seat in the chancel, formerly used by the family of the rector. — *Spry v. Flood*, 353. (Consist.)
2. (*Possessor's right.*) Such a right is sufficient against a mere intruder.—S. C.
3. (*Right of rector.*) The spiritual rector of the parish is, by the common law, in the absence of any adverse title by prescription, entitled to the chief seat in the chancel. *Quære*, as to the rights, in this respect, of a perpetual curate.—S. C.

**PRACTICE.**

1. (*Costs of opposing will.*) Where such costs are given out of the estate of the deceased, they are taxed, not as between proctor and client, though more liberally than between party and party.—*Edmunds v. Unwin*, 641. (Prerog.)
2. (*Desertion of appeal.*) Where a party, who appealed from the judgment of a Bishop's Court, had not taken any steps within the time allowed by the minutes of appeal, and accordingly, but without calling on the case, a minute was made in the same Court that "the appeal was deserted:" Held, by the Court of Arches, that there was not, in fact, any desertion of the appeal.—*Rookes v. Rookes*, 345. (Arches.)
3. (*Evidence—Release of interest.*) The Court, on rescinding in this case the con-

clusion of a cause for the purpose of a witness being released, who was incompetent by reason of his liability for costs, intimated the intention of not making such orders for the future.—*Goodrich v. Jones*, 630. (Prerog.)

4. (*Service on wife—Domicil.*) A citation from the Consistory Court of London, at the suit of the husband, who resided in that diocese, having by letters of request been served upon the wife in another diocese, the Court pronounced her in contempt; the domicil of the husband being *prima facie* that of the wife.—*Whitcomb v. Whitcomb*, 551. (Consist.)

And see ADMINISTRATION, 3; CHURCH RATE, 2, 4; CRIMINAL SUIT; WILL, 5.

PROPRIETARY CHAPEL. See BISHOP'S LICENCE.

SCOTCH LAW. See ADMINISTRATION, 2.

SOLICITOR.

(*Liability for costs.*) *Quære*, whether a solicitor, by retaining a proctor, becomes legally responsible for the costs of the suit.—*Allen v. Macpherson*, 513. (Prerog.)

And see EVIDENCE, 1.

WILL.

1. (*Attestation.*) Probate of a will not attested in the presence of the testator, refused, though the witnesses were near enough to hear the testator breathe.—*In the goods of Ellis*, 595. (Prerog.)
2. (*Competency of witness.*) An attesting witness having, since the death of testator, married a legatee, to whom a legacy was given, not to her separate use, declared incompetent as a witness, and, having joined his wife in a proxy, liable to answer as party.—*Mackenzie v. Yeo*, 509. (Prerog.)
3. (*Same.*) The wife of an executor who was a party in the cause, held not a competent witness in support of a will.—*Young v. Richards*, 371. (Prerog.)
4. (*Evidence—Diversity.*) Where one only of the three witnesses deposed to seeing the testator sign, but the other two that did not see him, the will was admitted to proof, on the ground that positive evidence is stronger than negative.—*Chambers v. The Queen's Proctor*, 415. (Prerog.)
5. (*Evidence—Mistake—Diversity.*) One of the two attesting witnesses having deposed that the will was not attested in the presence of the testatrix, while the other deposed that it was, the Court refused to rescind the conclusion of the cause, for the purpose of re-examining the former witness, but did so for the purpose of examining other witnesses who were present at the time.—*Young v. Richards*, 371. (Prerog.)
6. (*Incomplete alteration.*) The word "four" in a will having been imperfectly erased, and "five" written instead of it, without attestation,—probate granted of the will with the word "four," which was still legible.—*In the goods of Beavan*, 369.
7. (*Implied revocation.*) Testator made two wills; the first appointing executors and disposing of all his property; the second, simply disposing of his property without appointing executors, and without referring to the first: Held, that the first was wholly revoked, and administration was granted with the second will annexed.—*Henfrey v. Henfrey*, 468. (Prerog.)
8. (*Revocation—Cancellation.*) Cancellation, by drawing a pen through the body of the will, and also through the signature of the testator, the attestation clause and the names of the witnesses: Held, not to be a revocation under 1 Vict. c. 26, s. 20.—*Stephens v. Taprell*, 458. (Prerog.)

9. (*Sanity—Delusion.*) The will of a man who committed suicide the day after its execution, while “under temporary insanity” as found by the jury, and who was shown to have been within a short time previous labouring under delusions as to the feelings and conduct of other parties towards him, (as, for instance, that it was the intention of the benchers of the Inner Temple to disbar him for a venial misstatement, made by him many years ago on his application for admission to the Inn,) such delusions, however, appearing in some instances to have yielded to reason, and the will itself, both in the manner of its execution and its purport, being perfectly rational,—admitted to proof, and the costs of the Queen’s Proctor, who claimed as upon an intestacy and in default of next of kin, refused.

The conflicting cases of *Cartwright v. Cartwright* and *Dew v. Clark* commented on by the Court, and the question considered how far a will is valid simply because it is “a rational act rationally performed.”—*Chambers v. The Queen’s Proctor*, 415. (Prerog.)

10. (*Seaman’s will.*) The will of a seaman, who went on shore on leave, and there died by accident, allowed as the will of a mariner “being at sea.”—*In the goods of Lay*, 375. (Prerog.)

11. (*Soldiers—East India Company.*) The term “soldiers,” in sect. 11 of 1 Vict. c. 26, extends to those in the military service of the Company.—*In the goods of Donaldson*, 386. (Prerog.)

12. (*Soldier’s will—Colonies.*) *Semble*, that an officer in garrison at Demerara, though considered by the War Office to be in “actual military service,” was yet not within the exemption given on that ground by 1 Vict. c. 26, s. 11.—*In the goods of Phipps*, 368. (Prerog.)

13. (*Suspicion of fraud.*) A will, which had been the subject of an indictment for forgery, which resulted in an acquittal, and for which an action for malicious prosecution was brought, and a verdict obtained, which was set aside,—admitted to probate, upon a very full review of the circumstances, “with great doubt and misgiving.”—*Panton v. Williams*, 530. (Prerog.)

14. (*Testamentary cheques.*) Cheques sealed up under cover, addressed to the bankers, and given by the testator to the parties to whom they were payable, with a direction not to present them till after his death: Held, to be testamentary, and yet not to be affected by a general clause of revocation in a subsequent will.—*Gladstone v. Tempest*, 650. (Prerog.)

## PRIVY COUNCIL.

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[Containing 2 Moore, Part 2.]  
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**ACCOUNT.** See **PRACTICE**, 1.

**ACT OF PARLIAMENT.** See **WEST INDIA COMPENSATION ACT**.

**APPEAL.** See **JURISDICTION**, 3.

**CHURCH RATE.** See **APPEALS ON REPORTED CASES**.

**COVENANT.** See **WEST INDIA COMPENSATION ACT**.

**CANADA ACTS.**

1. (*Court of Appeals.*) The Court of Appeals in Canada, as constituted by the 32 Geo. 3, c. 2, and the 34 Geo. 3, c. 2, is in its nature a Court of Error similar to our own, and is precluded from taking cognizance of matters not appearing on the record of the inferior Court.—*Powell v. Washburn*, 199.
2. (*Security on appeal.*) The “proper security” used in the Canada Act, 34 Geo. 3, c. 2, s. 35, as to the security to be given by an appellant party, means security with proper sureties; but the objection not having been taken by the respondent in the Court below, and an order reviving the appeals having been obtained by the representation of the appellant, was overruled as too late.—*S. C.*

**COLLATERAL SECURITY.**

(*Extinguishment of debt.*) A. gave to B., in payment of a debt, bills drawn upon C., and executed at the same time a mortgage of land in Demerara as a security for the due payment of the bills. C. paid the bills, and afterwards, upon the insolvency of A., took an assignment of the mortgage: Held, that according to the Dutch law which prevails in Demerara, according to which the collateral security ceases with the original debt; and considering also, independently of the Dutch law, that C., being drawee, must be taken to have paid the bills in that character, and not to have purchased them as transferee, that he was not entitled to any benefit of the mortgage security.

But it was held, as to other bills, part of the same transaction, which C. paid after agreement with A. that he should have the benefit of the mortgage, that he was entitled to such benefit to the extent of payments made under that agreement, though he had only paid some of the bills referred to in it.—*Wilkinson v. Simson*, 275.

**CONFLICT OF LAWS.**

(*Contract—Place of performance.*) A. lent money to B. on mortgage of land in Demerara, to be repaid by bills on Scotland: Held, that the contract was governed by the law of Scotland, and that, monies having been paid from B. to A., which according to that law were referable to other debts, the mortgage was still subsisting for the whole amount.—*Campbell v. Dent*, 292.

And see **DOMICIL**.

**DOMICIL.**

(*Will in execution of power.*) *Quere*, whether an instrument in execution of a power to be exercised by will, is to be executed according to the testamentary law of the country where the donee resides, or according to that of the country of the donor of the power.—*Tatnall v. Hankey*, 342.

**FEEES OF OFFICE.**

(*Private arrangement.*) The government land surveyor who, under the general regulations of the colony (that of the Cape of Good Hope), would have been entitled to receive, through the district secretary, certain fees to be paid in advance by the parties receiving allotments, having, with a view to the more easy distribution of public lands, entered into an arrangement with the secretary, according to which the latter was to collect the fees for him—not in advance, but from time to time : Held to have no claim upon the colonial treasury upon the insolvency of the secretary.—*Van Rooyen v. Vanderheit*, 177.

**GRENADA, ISLE OF.** See JURISDICTION, 3.

**JURISDICTION.**

1. (*Appellate not original.*) An attempt to bring a case before the Privy Council, without first having it tried by the ordinary local tribunals (in the island of Jersey), repelled both for want of original jurisdiction, to be so exercised in this way, and because no sufficient grounds were shown for the exercise of any extraordinary powers, sometimes used, in correcting or controlling the acts of the ordinary courts.—*Re Gould*, 188. (See *infra*, *Re Stronach*.)

2. (*Court of probate—Execution of power.*) When a power is given to be executed by will, a court of probate has jurisdiction to decide whether the instrument purporting to be an execution of the power is testamentary in its nature, that is, whether, regard being had to the circumstances of its execution, it would be entitled to probate, supposing the donee of the power was entitled to make a will, and it referred to property of his own.

In this case, the prerogative court was held to have been wrong in refusing to decide whether an instrument executed by the donee, of a power not according to the testamentary laws of the foreign country where she was residing, but according to the testamentary law of the country of the donor of the power, was entitled to probate or not.—*Tatnall v. Hankey*, 342.

3. (*Isle of Grenada—Special application to Crown.*) By the Grenada Colonial Act, No. 250, made in pursuance of the Slave Abolition Act, the jurisdiction of the Chief Justice is final, and without appeal; but their lordships, in refusing leave to appeal from an order of the Chief Justice, in consideration of the hardship of the case, suggested a petition to the Crown through the secretary of state, which might be referred to them generally for their opinion.—*Re Stronach*, 311.

**MAN, ISLE OF.**

1. (*Equity of redemption.*) Held, that before the passing of the 3 Will. 4, c. 27, which applies to the Isle of Man, the equity of redemption of lands there was, under the act of Tynwald, of 1703, called the Act of Settlement, which followed, it seems, the previous law of the island, barred by the lapse of twenty-one years from the date of the mortgage, though the mortgagor had remained in possession and paid interest of the mortgage debt.—*Christian v. Goldie*, 226.

2. (*Forfeiture of dower.*) By the common law of the Isle of Man, confirmed by an ordinance of the Court of Tynwald and Governor in 1687, a widow is entitled to dower only "*dum sola et casta vixerit*," and was held to have forfeited it by the birth and affiliation of a bastard child.—*Cain v. Cain*, 222.

#### MORTGAGE.

- (*Transfer—Payment.*) A. having borrowed money on mortgages from B., such mortgage was afterwards, with the concurrence of A., transferred to C., the correspondent of A., who paid the money to B. by bills, for which he charged A. in the general account between them: Held, that this was a transfer, and not a satisfaction of the mortgage.—*Campbell v. Dent*, 292.

And see WEST INDIA ESTATE.

POWER. See WILL.

#### PRACTICE.

1. (*Account—Reference.*) Accounts referred to arbitrator appointed by their lordships under the power given them by the Privy Council Act 3 & 4 Will. 4, c. 41, s. 17, without the consent of the respondent.—*Hutchinson v. Gillespie*, 243.
2. (*Doleance—Ex parte judgment—Hardship—Remittal.*) A party having presented a doleance and petition against an order of the Royal Court of Jersey, made *ex parte* in a proceeding against him for breach of the revenue laws, their Lordships considering that such order might properly, according to the practice of the Court, be made *ex parte*, dismissed the petition and doleance; but considering the hardship of the case, and particularly that the petitioner had neglected to defend himself in ignorance of what the law allowed to be done against him in his absence, remitted the case to the Court below.—*Re George Whitfield*, 269.

And see CANADA ACTS, 1; JURISDICTION, 3.

#### RATE OF EXCHANGE.

- (*Time and Place.*) It is quite clear, according to the principles stated in *Cash v. Kennion*, 11 Ves. 314, that a debtor making default in payment at a particular time and place, is bound to make good the payment, according to the rate of exchange then and there existing; and it was held no ground for dispensing with the rule, that the agent of the creditor had authorized the debtor to retain the money "until a better time," having done so upon the representation of the debtor, which was not proved to be true, of certain impediments, arising from the political circumstances of the country, to the remittance of the sum in the manner agreed upon.—*Bertrand v. Bertrand*, 212.

#### SCOTCH LAW.

- (*Debtor and creditor—Appropriation of payment.*) According to the Scotch law, where money is paid by a debtor without specific appropriation by him to a creditor to whom he is indebted on several accounts, the creditor may at his option impute it to any of such debts; and it was held that he might do so, when the effect of such option was to leave a mortgage subsisting upon land in Demerara, which is subject to the Dutch Law.—*Campbell v. Dent*, 252.

SLAVES. See WEST INDIA COMPENSATION ACT.

#### WEST INDIA COMPENSATION ACT.

- (*Lessee of slaves—Special covenant.*) Lessee of slaves held entitled to a portion of the money awarded under the act, notwithstanding a covenant in the lease to

refer to arbitration in case of loss by abridgment of the labour of slaves, or diminution of the returns, by means of any act of parliament or regulation of the colonial legislature; the act for the total abolition of slavery not having been contemplated by the parties.—*Gordon v. Bruce*, 261.

**WEST INDIA ESTATE.**

(*Mortgage to consignee and sale subject thereto.*) A. mortgaged a West India estate to B., the consignee thereof, agreeing also to take all his supplies from him, and that the produce should be applied first in payment of the supplies, and then in payment of the mortgage debt, for which the produce was to be the only security; and it was further agreed that he should not sell or incumber the estate without the consent of B. A. afterwards, with such consent, sold the estate to C., who took upon himself the mortgage debt and the covenants from A. to B., and afterwards made a mortgage to B., agreeing to pay the money then due to him, and to perform the covenants, except as to the taking of supplies, which he was to be at liberty to procure elsewhere. C. had before mortgaged the estate to A. as a security for the purchase money, which was unpaid. C. continued to take the supplies for the estate from B. Held, reversing the judgment in the Court of Trinidad, that the money due for such supplies, as well on the mortgage debt due to B., had priority over the mortgage to A.—*Brown v. Anderson*, 249.

**WILL.**

(*Imperfect paper.*) The presumption raised against the intended finality of a paper by the existence of an attestation clause without actual attestation, held to be sufficiently rebutted by the evidence, particularly that of the testator having been told, with reference to the will of another person, that actual attestation was not necessary; the Court observing upon the weight that was due, in such cases particularly, to the opinion of the judge below.—*Stewart v. Stewart*, 193. And see **DOMICIL**; **JURISDICTION**, 2; **APPEALS ON REPORTED CASES**, 1.

**APPEALS ON REPORTED CASES.**

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**HOUSE OF LORDS.**

[Clark and Finnelly, Vol. vi. Part 4.]

**APPEAL.**

(*Practice.*) The House will not give relief on appeal, to a party who has not taken the proper course to get relief in the Court below.—*Tomney v. White*, 786.

N.B. All the other cases have been before noticed.



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## EVENTS OF THE QUARTER.

**MR. JUSTICE BOSANQUET** has resigned, and **MR. CRESSWELL** has been appointed a judge of the Common Pleas in his place. Without disparagement to other candidates, it may be said that no appointment ever gave more satisfaction both to the profession and the public. The only regret is that so able a judge should be thrown away upon a close Court like the Common Pleas, where there is a sad waste of judicial power already. The Reports of their proceedings have been aptly termed, "The Legends of Sleepy Hollow." The sole ground on which the closing of the Court was ever attempted to be justified, is the convenience of a separate bar in constant attendance; a convenience any Court might easily secure to itself, without creating an anomalous rank, or conferring privileges utterly inconsistent with the due administration of justice so long as the circuit system is preserved. Now experience has proved that the constant attendance of the serjeants is not secured, and they may often be seen plying for business wherever there is a chance of picking up any, whilst the judges of their own Court are clamouring for them. Whenever, therefore, the subject comes to be re-considered, the members of the coif must rest their claims wholly and exclusively on the antiquity of the institution. An occasion will soon offer, for rumours are rife that a new Court is in contemplation, with the view of relieving the Queen's Bench, and dividing the Northern Circuit, which could hardly be effected without two new judges. Probably the reform would not stop here. Since Liverpool and the other great trading towns are brought within a day's journey, they may justly claim to be brought a little nearer to an equality with the metropolis as regards the administration of justice; and it may eventually be found practicable to hold assizes three times a year in some of them. Effective measures should be taken without delay for the more speedy trial of criminals. It is said that the clearing of the gaols in Yorkshire and Lancashire, during the next circuit, is likely to encroach upon the time allotted for civil business.

We think it is **PELHAM** who, in allusion to the great increase of the peerage, remarks that it is no longer gentlemanly to be a peer. Upon the same principle it might be said that it was no longer a distinction to be a Queen's counsel, for they are now made in batches, less for what they have done than for what they are expected, or rather expect, to do. As times go, therefore, the gentlemen recently created are fairly entitled to the rank. They are: Messrs. **Wilbraham**, **Mathews**, **Koe**, **Teed**, **Lowndes**, **Purvis**, **Walker**, **Parker**, **Russell**, **Anderdon**, **Roupell**, and **L. T. Wigram**. It is a singular fact that all of these are of more than nineteen years standing, except **Mr. Wigram**, who was called in 1828.<sup>1</sup> Most of them at once selected their Court, and it is now regarded almost as a matter of course that every practitioner of eminence in the Courts of Equity should confine himself to one. It is to be hoped that the same rule will be adopted in the Courts of Common Law, but for this purpose the co-operation of the other branch of the profession, and in some sort of the public, will be required. There are at present (as there almost always have been) three or four leaders with more briefs forced upon them than it is

<sup>1</sup> Lord Abinger did not receive a silk gown till he was of twenty-five years standing.

possible for them to read,—much less attend to, when three or four Courts are sitting at the same time. Yet, as it is perfectly well understood that the client is to take his chance, there is no breach of contract of which he is entitled to complain; though all he gets for his money may be the gratification of seeing his cause conducted by a deputy whom he himself would never have dreamed of selecting, or left to a junior who is prevented from doing his best by the angel-like visits or hasty half-developed suggestions of his chief. This, however, is no concern of the judges, so long as the business is proceeded with; but it is both the right and the duty of the Court to call on every case in its order, and dispose of it without reference to what is called by courtesy the convenience of the bar, in other words, the annual receipts of three or four leaders. Indeed, even as regards them, the difference would be slight. They would probably have as many briefs as ever, but care would be taken to retain and make sure of the attendance of some second counsel of ability. A late occasion for the enforcement of regularity was not very luckily chosen, but on the whole the Court of Queen's Bench has shown both firmness and judgment in its regulations for the dispatch of business, and the result is that the arrears are rapidly disappearing. The crown paper is exhausted, and a rule for a new trial has a fair chance of being argued within the year.

It has been in contemplation to make Reading the last place on the Oxford Circuit, with the view of attracting a portion of the business now carried to Croydon, where it has grown into a practice to try town causes in which issue had been joined too late for the sittings. To give the Western Circuit an equal chance, it ought to conclude with Winchester.

A measure for improving the registration of voters is in preparation, but nothing has transpired regarding its precise purport, further than that the number of revising barristers will probably be reduced. Fix the doubtful clauses of the Reform Bill, establish an appeal court, and subject vexatious objectors to costs, and not above one half the present number will be required.<sup>1</sup>

Another important measure expected to be brought forward early in the session, is the abolition of the provincial ecclesiastical courts, as suggested by the Real Property Commissioners.

The establishment of local courts of some sort has been mentioned in influential quarters, and the Bankruptcy Commissioners are of opinion that seventeen or eighteen judges would suffice to dispose of all the country bankruptcy and insolvency business in addition to that more specifically belonging to them. This is clearly impracticable, and we are convinced that the first object of the judicious law reformer will be to carry out the principle of centralization, which forms the characteristic excellence of the English administration of law. With railroads getting into full operation, there is no reason why Yorkshire or Devonshire should have worse judges than Middlesex.

The Copyright-Bill will be brought forward again, though not by Mr. Theaiger, who, to the best of our information, never expressed any intention of the sort. Its eloquent originator has unfortunately lost his seat, but Lord Mahon, Mr. Gladstone, Sir Robert Inglis, Mr. Milnes, and a host of other able and willing friends, are still members of the house.

The Exchequer Bill Fraud, as it is termed, has given rise to some curious discussion involving a nice question of law as well as momentous considerations of expediency. It seems extremely doubtful whether a private party, situated like the government, would not be obliged to pay the *bonâ fide* holders; and we understand

<sup>1</sup> See, on this subject, 23 L. M. p. 22.

that bankers are in the constant habit of paying forged cheques for the credit of their establishment. "Some bank clerks once obtained possession of several bank-notes, which were perfect in every respect save the signature; the signature they forged, and issued the notes to the public. What was the conduct of the Bank on the occasion? They justly said, how were the public to know that the notes were forgeries, when they are the same in every respect as every other bank-note in circulation; and it is the general appearance of the note, and not the signature, which the public trust. The Bank, therefore, hanged the delinquents, but they paid the notes.<sup>1</sup>" It yet remains to be proved that even the signatures are forged, and the care taken to hush up the matter has encouraged a suspicion that they are not.

The speech of Lord Wharncliffe, on presenting a petition for an amendment of the law of marriage as regards the prohibited degrees, has recently been published in a corrected shape; and from the impulse which his highly respectable name has given to the views we were amongst the first to advocate, we are led to hope that the legislature may be soon induced to sanction them. The Bishop of London's speech, which was little better than a summary of refuted fallacies, has been ably answered by Mr. Reynolds.

We have received several letters regarding the measures now in active operation for the improvement of attorneys and solicitors as a body, but we are not aware that we can do more than repeat our opinion of their propriety, with a regret that something is not done to effect a corresponding improvement in the bar. Persons have been called within the last ten years, who would find it extremely difficult to stand either the examination or the inquiry into character to which the candidate for admission must submit.

Jan. 26th, 1842.

<sup>1</sup> "The Exchequer-Bill Fraud," p. 14. See, also, a pamphlet entitled "*The Case of the bona fide Holders of the Repudiated Exchequer-Bills.*"

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*Notices to Correspondents.*—The subjects suggested by J. B. W. are under consideration.—"A Liverpool Solicitor" will see that his suggestion has been attended to.

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*Erratum*, p. 63. For 1820 read 1830.

*Erratum in Vol. 26*, p. 158. The statement that the marriage of a man with the sister of his deceased wife is not interdicted by the Scotch law, is incorrect.

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# THE LAW MAGAZINE.

## ART. I.—THE REPORT ON BANKRUPTCY AND INSOLVENCY.— THE NEW BANKRUPTCY BILL.

1. *Report of the Commissioners for Inquiring into Bankruptcy and Insolvency. Presented to both Houses of Parliament by Command of Her Majesty. Printed 1840.*
2. *Supplementary Paper. By William John Law, Dissentient from the Report.*

THE grand fault of this Report is its brevity. The majority of the conclusions are unaccompanied by reasons—*sic volo, sic jubeo, stet pro ratione voluntas*—and when any thing like argument is attempted, it is pretty sure to be all on one side. The signatures attached are those of Mr. Justice Erskine (late chief of the Court of Review), Messrs. Evans, Fonblanque, and Holroyd (Bankruptcy Commissioners), and Messrs. Wynne Ellis, B. Hawes jun., G. Carr Glyn, and J. Horsley Palmer—high names undoubtedly on such subjects, but hardly high enough to bear out the apology thus politely suggested for their cursory mode of discussion by Mr. Law :

“ The many may be listened to, saying that they see no good reason why the affairs of one person who cannot pay his debts should be dealt with in a different manner from those of another person who cannot pay his debts : the one, who believes that he does see such reason will not be listened to unless he shall endeavour to explain what that reason is. The majority may be content to say, on the subject of trust deeds and their subjugation to bankruptcy, that they only recommend the placing them under more efficient control : the dissentient may apprehend, that for him to deal so briefly with a subject that has occupied much inquiry would be deemed vague and unassisting. The many, while they condemn existing institutions as not adequately punishing fraud, and as



encouraging fraud, can decline all expression of opinion whether in future such institutions should have the power of punishing it at all; he who stands alone dares not to condemn without pledging his judgment to a suggestion of amendment."

This might be very true had the commission been appointed to decide what measures it would become an arbitrary government, like that of Prussia or Austria, to carry into effect without delay; but here, where there is little chance of carrying any reform whatever until public opinion has been thoroughly enlightened regarding it, and a popular assembly thoroughly convinced of its expediency, a Report is likely to remain a dead letter, unless it contains a full exposition of the views it is intended to enforce. The one before us has attracted far less attention than the subject warranted us in anticipating, and the main reason we take to be the impossibility of ascertaining the merits of the main questions without wading through the mass of matter contained in the Appendix, which the reader is left to analyze, digest, or ransack for himself. Occasionally, too, a want of due developement may create a suspicion that the subject has not been viewed in all its bearings, though we are convinced that such a suspicion would be unfounded.

The introductory passages, describing the origin and object of the bankruptcy and insolvency laws, run thus:

"The law relating to bankrupts is confined to traders under certain conditions.

"The law relating to insolvent debtors is applicable only to debtors (whether traders or non-traders) who have undergone a certain imprisonment.

"The immediate object of the bankrupt law is the equal distribution of the effects of traders, who cannot meet their engagements; its ordinary consequence is, the release of such traders from all future liability of their persons, and after acquired property.

"The object of the law for the relief of insolvent debtors is the personal discharge of honest debtors, prolonged imprisonment by way of punishment for the dishonest and fraudulent, and a fair distribution of their present effects, and future acquired property, amongst their creditors.

“ It appears to us that there are defects in both these branches of the law, and that the provisions of each are inadequate to the several objects they have in view.

“ The statutes relating to bankrupts were originally enacted to meet cases of fraud for which the ordinary forms of the law did not afford effectual remedy, and were founded upon principles of extreme severity. By progressive alterations they have become more lenient, and have been extended to many classes of persons not originally included within their provisions.

“ The bankrupt law provides indeed efficient means for the discovery of property, and the detection of frauds, but it is defective in provisions for the punishment of dishonesty ; for, if the bankrupt fully discloses his transactions, and submits himself to the jurisdiction of the Court, (even at the last moment, and after a most litigious resistance,) his misconduct, however flagrant, cannot be visited by any direct punishment.

“ On the other hand, the law for the relief of insolvent debtors affords no efficient means for the discovery of property, or the detection of frauds, but does afford (though to a very limited extent) an indirect power of punishing dishonest and fraudulent debtors by a remand to prison.

“ There are thus two systems of law relating to debtors who cannot satisfy the demands of their creditors :—the one being confined to traders, comparatively deeply involved, whom it protects from personal restraint, whilst by the other, those who have contracted debts to a smaller amount must undergo imprisonment ; by the one, the debtor obtains an absolute release, and by the other, a release only of his person ; by the one, prompt and effectual powers for the collection, the discovery, and the seizure of property are afforded, and by the other, very inefficient means ; by the one, there is no power to punish admitted frauds, and by the other, such power is given, (though to a very limited extent) ; the one operates *in invitum*, whilst the other may be, and can only be, put in force by the voluntary act of the debtor.”

Entering a little more into detail, they particularize a few of the main evils. They first expatiate on the injustice to which the small trader is exposed in being excluded from the operation of the bankrupt law ; and it certainly is extremely hard

that the insolvent merchant should remain at large during the settlement of his affairs, whilst the retail dealer, whose debts are not of sufficient magnitude to justify a fiat, is obliged to undergo a preliminary period of imprisonment. The distinction originated in a belief that the merchant was more exposed to risks; but a little shopkeeper is just as likely to be ruined by a bad debt or an unlucky purchase without any imputation on his honesty. The common law commissioners pointed out this oppressive inequality many years ago, and the extent of its operation may be estimated from the fact, that out of 3691 petitions filed in the Insolvent Court in 1839, about two-thirds were from traders.

The next alleged evil is the continuing liability of discharged insolvents as regards property :

“ The future liability of all insolvent debtors is, in our opinion, a most unjust and impolitic law :—The insolvent law, after interrupting a man in his business, taking all his property, imprisoning him until his place in business is occupied, and then turning him out destitute, a proclaimed insolvent, and unworthy of trust, nevertheless expects him at some future time to acquire property which he is to give up for distribution amongst his creditors. The practical result is, that he makes no exertion beyond supplying his daily wants, and too frequently becomes a permanently degraded character ; his family are brought up ill ; hence society loses, and the creditors do not gain. An honest industrious man, who has been discharged as an insolvent, beginning anew without capital, with diminished chance of obtaining credit, with broken spirits, and health probably impaired, necessarily labours under such disadvantages in competition with others having capital and credit, that he must be considered as a successful man, if he can barely get his living, and bring up a family.”

In support of this opinion, they appeal to Mr. Serjeant Stephen, who in his Supplementary Paper to the Fourth Common Law Report, observes that “ the liability of the after-acquired estate, though rarely productive to creditors, is apt to paralyze the future exertions of the discharged insolvent and to throw a gloom over the rest of his days.”

The difficulties thrown in the way of the honest trader who

wishes to divide his property fairly, and the facilities afforded to the dishonest one who wishes to favour a friend or make up a purse, are the next topic ; but it is to be wished that a little more time and space had been devoted to them.

Instead of proceeding to mention the many other defects which, as will presently appear, have been proved and are admitted to exist, they then pause to sum up what has been already indicated, and introduce a suggestion which constitutes the most original feature in their lucubrations.

“ We are of opinion that, not only should debtors be allowed, but that inducements should be held out to them, to make a cession of their property at such period of their difficulties as will best ensure equal justice to all their creditors.

“ The introduction of voluntary cession as part of the law of England was first suggested by a learned, able, and judicious writer on the bankrupt laws, the late Sir W. D. Evans, Recorder of Bombay. Voluntary cession also is strongly recommended by your majesty’s commissioners in their Fourth Report on Courts of Common Law, and by most of the witnesses who have been examined by us; and, as observed by Sir W. D. Evans, this is no new principle. ‘The same principle has been actually adopted by the Parliament of Great Britain, and the boundary between England and Scotland marks the limits of its admission or rejection.’ This principle, too, some years after the first publication of Sir W. D. Evans’s letter, was recognized and partially adopted, though in a very ineffectual manner, in the law of bankruptcy in England.”

It is very easy to say that all conceivable inducements should be held out to men to act honestly ; but how this is to be effected is the real question, and the Commissioners unluckily make no attempt to answer it: on the contrary they place their reliance in a measure of a compulsory character, which will be best explained and defended in their own words :

“ Since the abolition of arrest on mesne process a test of insolvency, admitting of a speedy and cheap mode of proceeding for determining its sufficiency, has been much wanting.

“ This point has engaged our closest attention ; we have endeavoured to consider it with reference to the interest both

of creditors and debtors, and we are fully satisfied, after most mature deliberation, that the test of insolvency, or inability in a debtor to meet his engagements in the ordinary course of his business, which we shall now humbly propose to your majesty, will afford due protection to creditors, and will not in any way interfere with the just rights of the debtor.

“ We think that a creditor, having delivered the particulars of his debt to the debtor, and having demanded payment, should, upon filing an affidavit of these circumstances, and that his debt is justly due and remains unpaid, be entitled to a summons for the purpose of compelling the appearance of such debtor, and of ascertaining from him, upon his oath, whether he believes he has a good answer to the demand, or to any, and what part thereof.

“ The object is, that where a debt claimed, or any part of it is clear and indisputable, and the debtor does not pay the admitted sum into Court, or to the creditor, or give security to pay within a reasonable time, such default should be taken as proof of insolvency, and such debtor should immediately become amenable to the law for the equitable distribution of his property, if his creditors desire such a course to be adopted.

“ But if, instead of admitting the validity of the debt on which he is summoned, the debtor believes he has a good answer to the demand, and will swear to such belief, the present law will take its course, and neither the person nor property of the debtor will be interfered with until the creditor shall have established the debt, and obtained judgment.

“ It is obvious that such a proceeding would be both very cheap and very expeditious, and at the same time more just towards debtors than the proceeding by arrest on mesne process was; for a debtor, when arrested, must have found bail or gone to prison, without having afforded to him any opportunity of denying a claim to which he might have had a just defence.”

We do not expect quite so much good to result from this expedient as the inventors, but we think their answers to the obvious objections satisfactory. Thus, it is objected that persons in temporary difficulties, but solvent, might thus be

driven into bankruptcy. The answer is, that cases of the kind would be rare, as a creditor would seldom precipitate a catastrophe unless he had good ground for doubting both the good faith and solvency of the debtor. Again, it is objected that one creditor might thus get paid to the disadvantage of the rest. The Commissioners ask, as Mr. Serjeant Stephen asked before them, why should he not? "First come, first served," is a sound though homely maxim, and it is by no means clear that the main body of creditors will be injured by holding out a premium to alertness.

"In further answer to this objection, it may be stated that as the law now exists, a debtor may with perfect security give preferences to any extent; he has only to give a hint to the favoured creditor that his affairs are embarrassed, and if the creditor sue out a writ, or write a threatening letter, a payment to him is perfectly valid; and such preference may be completed in one hour; consequently, as to voluntary preferences, this alteration of the law would not act injuriously, but, in truth, it would be the greatest obstacle to such preferences.

"At present a debtor, who is insolvent and wishes to give preferences, resists the hostile creditor's just claim, in order to prefer the favoured creditors; and it frequently happens, that from preferences and other frauds, the hostile creditor receives no satisfaction and is burthened with heavy costs; but if the creditor had the power to summon his debtor before a judge, the debtor would not be able to delay the hostile creditor, and must either satisfy him or declare himself insolvent, and surrender his property to be equally divided. In the short time that would elapse, the debtor, if dishonest, would have less opportunity for giving preferences, or committing other frauds."

As to the alleged "tyrannical and inquisitorial" character of the proceeding, it forms about as sound an objection as the term "unenglish" applied to ballot, "centralization" applied to the rural police, or "bloody Queen Mary" applied to Catholic emancipation. If indeed thumbscrews or Spanish boots were to be employed in the process, the allusion to the Inquisition would be natural enough, but the debtor may answer or not as it pleases him, and the small check likely to be exercised over his mode of answering forms, in our opinion, the

chief drawback to the plan. The Commissioners remark on this topic :

“ It has also been urged that the course of proceeding suggested would be productive of perjury. In no case could perjury be feared, or be advantageous to the debtor, except when there was no evidence of the debt but the creditor's oath, or when the debtor was about to abscond and defraud his creditors. It is incredible that any sane person should swear (unless under the circumstances stated) that he believes he has an answer to a just debt, when he is aware that the existence of the debt can be easily proved. Indeed a man must be strangely abandoned to all shame who would do so under any circumstances ; and under the practice now existing in the Court of Bankruptcy of summoning debtors, we know from experience that men, answering in person in the face of a Court, will rarely, if ever, speak falsely on such a subject. In some thousands of cases which have come before your majesty's Commissioners of the Court of Bankruptcy, there have scarcely been a dozen where the debt has been absolutely denied, and a much smaller number in which such denial was believed to have been false. The summons generally produces immediate payment without personal appearance, and in the comparatively few instances in which the parties do attend, their answers resolve themselves into pleas of inability, or applications for time. In fact, the experiment of the effect of personal summons has been extensively tried, and has most extensively succeeded. The case of a creditor, having no evidence of the debt but his own oath, must be exceedingly rare ; in such case the fault is with the creditor, and admits of no remedy in the Courts of Law, while the resort to a Court of Equity by bill of discovery proceeds upon the principle we are here recommending. If there be probable cause for believing that the debtor is about to abscond, a judge would allow him to be held to special bail.”

The following (the concluding) paragraph of this section is a good illustration of the mode in which important topics are slurred over in this Report :

“ Evidence has been given before us on the subject of trust-deeds ; the only alteration in the law relating to arrangements



with creditors through the medium of such deeds, which we think it right at present to recommend to your majesty, is, that they should be placed under more efficient control."

The degree and nature of this control is the very point to which attention was called by the printed queries. We will endeavour to throw a little light on it by an extract from Mr. Law's Supplement, and the answers received by the Commissioners.

"It is well known to be the case, and it always must be the case (says Mr. Law), that many considerable insolvencies are sought to be arranged and wound up between debtor and creditors without the aid of the Court of Bankruptcy: it is a subject altogether analogous to that of bankruptcy—employed on the same matters, and for the same purposes.

"Much discussion will be found to have taken place on the want of an assisting tribunal when difficulty arises in the management of these trusts, whether in the ascertaining of claims, or in the control of the administration: there are among mercantile men and solicitors those who desire to have the benefit of the bankruptcy system without the incumbrance of it:—to manage an estate in their own way, with privilege of calling in aid the services of a commissioner of bankrupts, when convenient: that the tribunal may aid in effectuating, not the objects of the law of bankruptcy upon the principle and according to the course prescribed by the statutes, but any variety of trust which such compacts admit of: whereby the parties interested in each insolvency may make their own bankrupt law for the occasion, and require that tribunal to execute it in the event of their failing to execute it themselves.

"Nothing that I have heard has convinced me of the wisdom of allowing this licence:—These private bankruptcies are to be tolerated and protected on the broad principle that it is open to all men to make contracts according to their own pleasure:—but if, on a subject where the institutions of the country provide the best and soundest method of arrangement, as for the administration of the estate of an insolvent trader, parties interested elect to avoid this resource and to trust to their own contrivances, let them in those contrivances provide against probable difficulties, or take the risk of ordinary litigation.

“Those who lean to a different opinion wish that a commissioner of bankrupts should be always ready as a Court of Aid in such matters of private compact; to decide a creditor's claim;—to audit a trust account;—to tax a solicitor's bill;—to exact payment of a dividend;—to control an embezzling or refractory trustee. The foundation of this wish is twofold:—1. To keep the debtor out of the Gazette:—2. Cheapness of administration.”

He thinks that the debtor will derive little advantage from being kept out of the Gazette, if incidental discussions are to take place regarding him before a Court, and he does not see how judges could interfere with either credit or effect, unless the entire course of proceeding were placed under their control.

One of the printed queries is :

50. “In your opinion, is it more advantageous to creditors that the property of a bankrupt should be administered under a fiat in bankruptcy, or a trust-deed?”

The following respondents are of opinion that the property is best administered under fiats: The late Lord Henley; Mr. J. G. Langham; Mr. J. Nicholls; Mr. F. Whitmarsh; Mr. Helm (Worcester); Messrs. Perkins, Lea, Pearman, and Baxter (Coventry); Mr. Fawcett (Carlisle); Mr. Tyrrell (Exeter); Mr. Brandt (Manchester); Mr. Barnside (Nottingham); Messrs. Tireman, Stanhope, Brookfield, Rodgers, and Wheat (Sheffield); Mr. Gunning (Bath); Mr. Scott (Birmingham); Mr. J. R. Coster (Boston); Mr. Drake (Exeter); Mr. Blanchard (York); Mr. T. Ridding (Southampton). A few prefer trust deeds, and a great many sagaciously suggest that the result must depend on circumstances, and that whatever's best administered is best. Mr. P. Taunton (Bristol) says that, so far as he has heard, the creditor fares best under the fiat, and the solicitor best under the deed of trust.

The answers comprise the experience of observing men from all parts of the kingdom. The inference is, that trust-deeds are resorted to principally on account of the inefficient relief afforded by the law, and that, when that law shall be improved, there will be little occasion for resorting to them in avowed cases of insolvency.

The next topics discussed in the Report are “The Trading,” “The Petitioning Creditor's Debt,” “The Act of Bankruptcy,”

“The Fiat and the Certificate,” each of which has a section to itself.

*The Trading.*—“Persons, who are not directly within the description of those who are subject to the bankrupt law, are often, in an indirect manner, upon the ground of some collateral dealing, brought, and sometimes seek to be brought, within the scope of the law, though the credit and capital required for the purpose of the collateral dealing is little or nothing compared with that of the principal business or calling. Hence the question, as to what constitutes a trading within the meaning of the statute, is the cause of much litigation and expense.

“The following description of persons may be mentioned amongst those who are now often brought within the operation of the bankrupt law in an indirect manner, though being, by express exception, or otherwise, out of its provisions, and in regard to whose dealings, litigation has in consequence arisen :—

“Farmers, Graziers, Brickmakers, Workers of mines, Attornies, Schoolmasters, Livery-stable keepers, Lodging-house keepers, Ship-owners, Coach proprietors, Carriers, Auctioneers, Surgeons and apothecaries, Authors.”

Remarks are made on each of these callings or vocations, with the exception of authors, who, in strict logic, ought not to have been included in the list. Sir Walter Scott most unfortunately brought himself within the scope of the bankrupt laws by becoming a partner in a publishing business, but this had no necessary connection with his authorship.

“These” (say the Commissioners) “are but a few of the numerous cases of disputed or equivocal tradings, which have occupied the attention of the Courts. They have afforded subject of dispute to the most learned, and have had a constant tendency to disturb the dealings, and vary the contracts of those who cannot be supposed to have contemplated or comprehended these legal niceties.

“In our opinion much litigation and expense would be saved by extending the specific description of persons liable to the bankrupt law, and we think that the law should be made to apply directly to all persons engaged in trade, or business requiring capital and credit.”

We think, with Mr. Law, that any such enactment would be objectionably vague. Let the law be specifically extended to each of the callings above mentioned (except authors), and let as many as can fairly be brought within the category be included; but it is hopeless to expect that any definition or general description will exclude doubt. For example, if farmers were to be named, would a proprietor, selling his own produce, be within the meaning of the words? Still a great deal might be done by careful legislation, and some of the existing contrivances for converting people into traders, as by calling an attorney a scrivener (a defunct profession<sup>1</sup>), are preposterous.

*The Petitioning Creditor's Debt.*—Previously to the statute 5 Anne, c. 22, the practice was for the creditor merely to make an affidavit that the party was indebted to him and the other creditors to the amount of 100*l.*, and no evil is said to have resulted from the lowness of the scale. The effect of the existing provision which requires a debt to one person or firm of 100*l.*, to two of 150*l.*, or to three or more of 200*l.*, has been to prevent small traders from being made bankrupts at all. Their creditors consequently lose the advantage of an equitable division of their property, and they themselves are compelled to submit to imprisonment, and pass through the vexatious and degrading operation of whitewashing in the Insolvent Court. The question how far debtors in general should be made subject to the same jurisdiction, will be presently considered; but there is little difference of opinion as to the justice of putting great and small traders on a par in this respect.

*The Act of Bankruptcy.*—It is difficult to make a man a bankrupt, and it is difficult for him to make himself one, without injurious delay. Can the process be accelerated without exposing the fair trader to harsh treatment, or affording the dishonest trader additional facilities for fraud? These are the essential questions connected with this head of inquiry.

<sup>1</sup> "This Mr. Ellis (an early friend of Dr. Johnson) was, I believe, the last of that profession called scriveners, which is one of the London companies, but of which the business is no longer carried on separately, but is transacted by attorneys and others. He was a man of literature and talents. He died Dec. 31, 1791." —*Boswell's Johnson*, vol. vi. p. 138, small edit.

“ The only modes of compelling a trader, who is insolvent, or unable to meet his engagements, to become bankrupt are, by obtaining final judgment against him, and proceeding to take him in execution, or by filing an affidavit of debt in the Court of Bankruptcy, and proceeding thereupon in the manner provided by the statute passed in the 1st and 2d year of your majesty's reign, c. 110, s. 8.

“ The first mode is dilatory, expensive, and unsatisfactory ; the second may also cause much delay and expense, and does not answer the purpose intended, for it is in fact nothing more than putting in bail, which, though in many cases, very difficult to obtain (and therefore in such cases operating harshly upon defendants having a good defence), is generally, when obtained, useless to the creditor. The trader, having given the required bond, may afterwards render to prison in discharge of his sureties ; and thus the creditor is put to great trouble, delay, and expense, the trader may dispose of all his property, and the creditor get nothing. The bond required to be given by the above statute was intended as a substitute for that security which a creditor before obtained through the medium of an arrest. But it has by no means the same effect in producing acts of bankruptcy as the fear of personal arrest on mesne process. Nor is the power of taking the person of a debtor in execution equivalent to the power of arrest on mesne process, for the purpose of forcing an act of bankruptcy. The power of arrest on mesne process caused not merely the act of bankruptcy by lying in prison for twenty-one days, but induced traders, who were unable to meet their engagements, to commit other acts of bankruptcy, by departing from their dwelling-house, or otherwise absenting themselves, or beginning to keep house. A trader, not being in fear of personal arrest till after judgment, has now no motive for committing any of these acts of bankruptcy until a judgment be obtained against him, when they are of comparatively little avail to creditors. We do not, on this account, advocate imprisonment for debt on mesne process ; but we would suggest that, as the motive for committing acts of bankruptcy in the early stage of a trader's difficulties is gone, some other compulsory act of bankruptcy or test of insolvency, at such period, is much to be desired.”

The same difficulty was formerly experienced in the case of traders entitled to privilege of parliament, and it was provided by 4 Geo. 3, c. 33, that if a debtor so situated, after being served with a summons, did not pay, secure or compound for such debt, or enter into a bond for payment of the sum recovered with costs within two months (reduced to one by 6 Geo. 4, c. 16), he was to be adjudged a bankrupt from the service of the summons.

As the Commissioners propose to put all traders on a par as regards liability to being taken in execution, by abolishing arrest, they were bound to allege some sound reason for their unwillingness to extend so "extremely salutary" a provision. The true one seems to be their strong partiality for a suggestion of their own, already mentioned and partially discussed.

"Considering, therefore, the difficulty of compelling an insolvent trader to become bankrupt, we are of opinion that a further remedy should be provided, and that such remedy may be found in adopting our previous recommendation of allowing a creditor, upon his making affidavit that his debt is justly due, that he has delivered the particulars of the same, and demanded payment of the debtor, and that the debtor, being a trader, has refused payment, to summon such debtor for the purpose of compelling him to state, upon his oath, whether he believes that he has any defence to the demand, or to any part thereof, and by making the non-payment within a certain time, of any sum admitted to be due, an act of bankruptcy. In support of the efficacy of allowing a debtor to be summoned for the purpose above stated, we refer to the observations we have before made upon this part of the subject. *We think it right here to add that, in our opinion, the plan suggested will be found in practice as efficient for creditors as the provision against traders having privilege of parliament.* It cannot be said to be infringing upon the fair rights of the debtor, when no burthen or duty is imposed upon him, except in respect of an admitted debt, which the debtor, at the time it was incurred, promised should be paid to the creditor at a certain specified time, without delay, risk, or expense."

The sentence in italics contains a somewhat rash assumption. The plan may be as stringent as the circumstances

would justify, but it certainly will never be as efficient as a provision to compel a satisfactory settlement or security. Indeed we are much mistaken if the Commissioners were not frightened out of a design to extend that provision by the fear that it might prove too efficient in bankruptcy. Mr. J. W. Freshfield, jun., is asked whether the avoiding of a suit through its instrumentality would not be an advantage "perhaps" to both parties—

"There is no doubt that it would; and in many cases there is no doubt that if a debtor were put into the Gazette the moment he stopped payment at his bankers or committed any other overt act of insolvency of that description, it would be beneficial to all parties; but there would be so many cases in which inconvenience would be occasioned by that very summary course of proceeding, that upon the whole I think it would be better that a man should not be driven to bankruptcy for a debt that is not ascertained by the courts of law, excepting where he has committed one of those acts of bankruptcy which now authorise the issuing a fiat against him. We see in practice a number of cases of very large mercantile houses who are in temporary difficulties, and who would be entirely destroyed by any summary proceeding of this description, and who yet, by a little delay, are enabled so resume their business and their credit; and the mischief of stopping one of those houses would be very much greater than the possible benefit that might arise in ten or a dozen inferior cases, in bringing parties to a speedy settlement of their debts. I speak mainly with reference to those cases of large mercantile houses in the city of London which are in temporary difficulty, and as to whom the precipitating them into bankruptcy, would be attended with the most serious inconvenience.

"You are unwilling to take away from parties who are in difficulties that breathing-time, as it may be called, which the delays of the law now afford them?—Yes, I am, decidedly."

In order to enable a trader to co-operate fairly and openly in making himself a bankrupt, the filing of a declaration of insolvency in the secretary's office has been declared an act of bankruptcy (6 Geo. 4, c. 16); but the forms required with the view of preventing fraud, render this mode of procuring a fiat more dilatory than any other, and the Commissioners propose to do away with it, and establish a substitute.

"Any time that elapses after a trader declares his insolvency, and previous to steps being taken to secure the pro-



perty for equal distribution amongst all his creditors, leaves the trader open to various importunities and temptations.

“ Having this in view, and considering that the declaration of insolvency is in itself a meritorious act, and that it was intended as a means for the honest trader to take legal steps to procure an adjudication of bankruptcy against himself, we think that the declaration of insolvency should be done away with *as an act of bankruptcy*; and that any trader, whether he had committed an act of bankruptcy or not, might, upon his own application, with the concurrence of one or more creditors qualified as required for the petitioning creditor, and upon proof of the concurring creditor's debt and of the trading, be adjudged a bankrupt.

“ This is in conformity with the law for regulating the sequestration of the estates of bankrupts in Scotland.”

The majority of the gentlemen examined state that bankrupts generally become bankrupts by their own consent.

*The Fiat, &c.*—The Commissioners consider the affidavit, the bond, and the fiat, unnecessary; and are of opinion that the parties aggrieved should make their complaints direct to the Court, and that “ the matters within its jurisdiction should be prosecuted in such form as the Court may direct, before one or more of its judges acting in the district in which the party complained of resides, unless otherwise ordered.” The Court here mentioned is the Court of Bankruptcy with improved machinery and extended jurisdiction.

*The Adjudication.*—At present the proceeding is *ex parte*; and a man may be declared a bankrupt, his property seized, his trade stopped, and his reputation destroyed, without an opportunity of proving that he has not committed an act of bankruptcy, or is not within the scope of the bankrupt law. His only remedy is an action, or a petition to the Court of Review, which comes too late. It is proposed that he shall have an opportunity of showing cause. It seems no more than fair that his right to bring actions should be restricted at the same time. The Commissioners propose, that if he consents to the adjudication or does not contest the bankruptcy within a limited period (not stated), the adjudication shall be conclusive both against him and persons liable to actions at his suit. No adjudication is to be founded upon an act of bankruptcy committed more than twelve months before.

*The Certificate.*—"We are of opinion that, having a due regard to the interest of creditors, to the situation of the unfortunate but honest bankrupt, and as affording the best check to fraudulent bankruptcies, and the various evils that generally result from them, it would be advantageous, that the granting of the certificate should be a judicial act, but that any of the creditors should be permitted to show cause against it, and that the decision should be subject to appeal. We also think that the judge should have power to annex such conditions to the certificate as the justice of the case may require."

There can be no doubt that the practice is at present open to much objection; but it is to be observed that opposition may be bought off much in the same manner as a signature is secured; and there is also some foundation for the fear, expressed by Mr. Langham and others, that many creditors who may have good grounds for refusing to sign the certificate and would refuse, would not step across the threshold to co-operate in a formal opposition.

Amongst a variety of suggestions regarding comparatively immaterial points, we find:

"We think that a person who has been adjudged a bankrupt should be liable to a criminal prosecution if he do not attend, and submit himself for examination whenever he may be directed by the Court, having no legitimate excuse for his absence; or if he has obtained credit by means of false pretences; or if he has attempted to account for his property by fictitious expenses or losses; or if he has made fraudulent sales or gifts of any of his property; or if he has knowingly allowed fictitious debts to be proved against his estate; or if he has appropriated trust-property to his own use; or if he has at any time concealed, destroyed, altered, mutilated, or falsified any of his books, papers, &c. with intent to defraud his creditors.

"We are of opinion that persons convicted of any of these offences should be imprisoned with or without hard labour, at the discretion of the Court, and that the judgment upon such parties should be advertized.

"Due facility should be given to prosecutions; and where the estate of the individual bankrupt is found insufficient to meet the costs, the Court should have power to order such

prosecutions at the public expense. But whether it would be desirable that the Court of Bankruptcy, or the Court for the Relief of Insolvent Debtors, or such Court as may be established in lieu of them, should have to any, or what extent, the power of punishing fraudulent debtors, we leave to the consideration of the legislature.

“ Many other points require revision and alteration : some may be amended by the rules and orders of the Court itself, when armed with sufficient powers : others will require the aid of legislative enactment ; but we think it expedient at present to abstain from more minute details as to matters of future amendment, till the practical working of a new system, should your majesty be pleased to adopt our humble suggestions, shall have been ascertained.”

The remarks on the administration of bankruptcy law in the country, stand much more in need of amplification than abridgement.

“ We now proceed to consider the defects in the administration of the law of bankruptcy in the country.

“ It appears, by the evidence which has been given before us, that there are strong grounds for dissatisfaction with the present mode of administering the estates of bankrupts in the country.

“ The fault is in the system, and not in the learned commissioners who administer it ; and many of them admit and lament the evils attending it which they can neither control nor amend.

“ There are at present 132 districts or places in the country where there are lists of Commissioners of Bankrupt, each list consisting of five commissioners, who are barristers, solicitors, and attornies practising in the different counties, and whose names are returned to the Lord Chancellor by the judges who go the several circuits, and are approved of by his lordship. There are in the country about 700 commissioners in 140 distinct and independent Courts.

“ The lists in most of the districts have very few fiats in the course of a year. During the last two years, only about thirty-five of the lists had more than five fiats directed to them, so that very many of the lists can have little practical experience in the prosecution of fiats in bankruptcy.

“ The evils of which, in our opinion, the public have cause to complain are :—

“ The constitution of the Courts of Commissioners in the country.

“ The objectionable mode of remunerating the commissioners.

“ The uncertainty attending these tribunals, both with respect to the law and the practice, necessarily arising from their multiplicity, and the want of sufficient practice.

“ The costs of working fiats.

“ The difficulty of access to the proceedings, from the want of some central and publicly known place of custody.

“ The trouble and delay in getting the commissioners together.

“ The want of publicity, and the checks attendant thereupon.

“ The delay in getting in the property.

“ The insecurity of the funds when collected.

“ The length of time before making dividends.

“ The small amount of dividends.

“ The absence of sufficient activity on the part of assignees.

“ The want of official assignees.

“ Fiats being frequently prosecuted at places in the country far distant from the principal creditors, who generally carry on business in London or the other great commercial or manufacturing towns.

“ The large sums of money lying in the hands of country bankers, assignees, and others, which ought to be collected and secured to the creditors.

“ We think that these evils will be effectually remedied by the establishment of the Court we shall humbly recommend to your majesty.”

This enumeration of evils reminds us of the sixteen reasons given for not keeping an appointment in one of the late Theodore Hook's farces—the first being that the man was dead. Most of the alleged evils undoubtedly result from the first—the faulty constitution of the Courts.

The strongest confirmation is afforded by the petition from the inhabitants of London :

“ That since the establishment of the said Court of Bankruptcy, your memorialists’ property under fiats, have been better protected, the law expenses greatly decreased, the dividends much increased, and the payments of them more quickly made, and to a much larger amount than formerly.

“ Your memorialists respectfully submit to your lordship, that the very reverse is the case in country fiats, where the solicitor’s bills are under no proper control, and heavy travelling and unnecessary expenses incurred and allowed, the payments of all the dividends prolonged to a very improper time, and invariably reduced to a most considerable extent.

“ That the bankrupt laws in the country are also partially and imperfectly administered, for your memorialists have been informed that in a country commission, under which four partners were jointly interested, one partner was the petitioning creditor, a second was an acting commissioner, a third was the solicitor to the commission, and the fourth was the sole assignee.

“ Your memorialists respectfully request your lordship’s serious attention to their case, and submit that at least a part of such evils may be remedied by the jurisdiction of the Court of Bankruptcy being considerably extended.”

The same course is pursued with reference to the insolvent law. Without giving themselves the trouble of discussion, the Commissioners sum up the supposed defects in a few peremptory sentences:—

“ Upon this subject the evidence which has been adduced before us preponderates greatly in support of the statement made by the Common Law Commissioners, that ‘ the loud and general complaints of the effects of the present insolvent law are well founded.’

“ The prominent defects of the insolvent law are, in our opinion,—

“ The making a certain term of imprisonment a condition precedent to the relief of the debtor who is willing to surrender his property.

“ The want of efficient means for the discovery and seizure of property, and for the security thereof.

“ The very limited extent to which frauds are punishable.

“ The facility of escaping detection and punishment, and

the difficulty and expense to which opposing creditors are subject.

“ The power of a detaining creditor to liberate a debtor, though remanded to prison for fraud.

“ The indiscriminate liability of future property.

“ The lengthened term of imprisonment of debtors in the country compared with those in London.

“ With such defects, we think that the Insolvent Law affords no effectual relief to creditors or to the honest debtor, whilst it tends to encourage the commission of frauds by the dishonest.”

Mr. Law hotly and ably contends that these imputations are one and all unjust, and we go along with him to the extent of thinking that the precise object of the insolvent law is sometimes mistaken, and its defects very frequently exaggerated. Thus, as regards the first head of accusation, the obvious answer is that the Insolvent Acts were passed to shorten, not inflict, imprisonment, and that it is illogical and unfair to pass judgment on the system as one invented for the sole purpose of promoting an equal division of the prisoner's property. It is one thing to propose the abolition of imprisonment for debt, and another to charge all its supposed evils on the law which removed the worst of them. Mr. Law says that it is not easy to escape detection, and that the imprisonment and examination of the debtor afford most effective means for the discovery of property ; he also argues that if the tribunal is not invested with sufficient power to punish fraud, the objection may be removed by the legislature. As to the expense to which opposing creditors are subject, he says :

“ The difficulty and expense of opposition is this : the creditor receives for nothing, ample notice and instructions for his own proceeding :—he studies at his leisure, day after day, without paying a farthing, all the papers and books of his debtor :—he commands at moderate expense copies of any portion, great or small, that he may select :—he takes his own course of objection, independent of assignees or other creditors :—he subpoenas his witnesses as in the superior Courts :—he is listened to, secure against interruption, whether in the evidence which he adduces, or in his examination of the

debtor :—if he opposes personally, he has every support and aid from the Court, equally with the insolvent his antagonist :—if he will not stand up in his own cause, then he must employ counsel :—and here is the pretence of hardship ; *that, in this particular instance, attornies and attornies' clerks may not be the advocates.*

“ I am sure that all parties would suffer by such a change: let it not be supposed that, as in the superior Courts, none but a barrister can open his mouth in communication with the Court : communications and explanations are going on constantly, information received from and certain applications made by attornies and their clerks, on behalf both of creditor and debtor : in some matters the attorney may call and examine witnesses, and address the Court in opposition to counsel : but to advocate the opposition to a final discharge on the merits, in representation of an absent creditor, is by the practice of the present Commissioners the privilege of the bar.”

All thinking persons are agreed that the present division of labour is absolutely necessary to the respectability of both classes of the profession. We have known barristers, impatient at the presumed neglect of attornies or reluctant to remain dependent on their patronage, propose that the bar should place themselves in direct communication with their clients ; and we have known attornies ambitious to discharge the functions of the bar. But we have always contended that any fusion of this sort would degrade both, besides greatly impeding the administration of justice, which can never proceed smoothly unless the proceedings are conducted by persons habitually conversant with the forms and rules of evidence. Moreover, as Mr. Law suggests, throwing open the practice would not have the effect of excluding regular advocates. The only result would be that a more miscellaneous, and perhaps inferior class, would attend in that capacity. This is what uniformly takes place in tribunals which are not attended by a bar. If it is hard on a solicitor to be obliged to pay a fee for doing what he would rather do himself, it is equally hard on the barrister to be obliged to decline every sort of business that does not come to him through the medium of a solicitor. One of his own immediate connexions



wishes for his opinion, or requests a consultation, or is anxious that he should take the entire management of an important arrangement; he must either make his friend a present of his services, or decline to render them, for the etiquette of the bar is peremptory, that no fee can be taken except through the professional intermediary.

It is by no means clear, however, that dissatisfaction on this score is the cause of the unfavourable opinion entertained, or, according to Mr. Law, said to be entertained, of the Insolvent Court. There are evils enough to make the complaints plausible, and we fear people ordinarily make their entrances and exits from its precincts in a very bad humour for bearing testimony to its utility.

The subject of the next section of the Report is the Union of the Bankruptcy and Insolvency Jurisdiction; in plain English, the abolition of the latter, for as arrest in execution is to share the fate of arrest on mesne process, we do not see what there is left for the Insolvency Law, as contradistinguished from that of Bankruptcy, to act upon.

Mr. Law draws some just and clear distinctions between the systems, and points out the unfitness of a machinery, framed for dividing property, for dealing with cases where there is frequently none to divide. But the proposed scheme necessarily excludes such cases, for, under it, no insolvent will be brought before the Court unless he has property; and the grand question for consideration is, whether all debtors ought to be relieved from all personal liability, without reference to the mode in which their debts have been contracted.

The Commissioners think they ought—that (to take Mr. Law's examples) the captain who does not pay his tailor, the clergyman who does not pay his bookseller, the clerk who does not pay his landlord, the barrister who does not pay his wine-merchant, the foxhunter who does not pay his horse-dealer, should be put upon the same footing as the merchant ruined by an unforeseen contingency, if they have property, and be allowed to laugh at their creditors with impunity, if they have none.

The subject of Arrest for Debt was pretty well exhausted in the Fourth Common Law Report, including the excellent Supplementary Paper by Mr. Serjeant Stephen, who dissented.

His four colleagues, the present attorney-general, Mr. Justice Wightman, Mr. Starkie, and Mr. Evans—names of undoubted weight—were of opinion, that arrest on mesne process might safely be dispensed with. It was accordingly abolished at the commencement of the present reign, and three of the questions circulated by the present Commissioners were put for the express purpose of ascertaining the effect of the change. A decided majority of the respondents are of opinion that the experiment has been unsuccessful; but this, as will be seen presently, is ingeniously converted into a reason for extending it.

Having already devoted two very long articles to the discussion,<sup>1</sup> we shall here content ourselves with presenting a brief analysis of the Commissioners' argument, which strikes us to be far from satisfactory.

They first pray in aid the following passage from the Fourth Common Law Report:

“ The principle of the present law is, to do justice by the use of the strong and compulsory means of arrest and imprisonment applied indiscriminately. The system has been found to be productive of so much hardship and injustice, that it was at last deemed to be necessary to mitigate its consequences by the enactment of the Insolvent Law. The joint operation of the two *opposite* processes, for the imprisonment and enlargement of debtors, has been productive of so much evil, as to lead to the suspicion, which seems to be fully verified by inquiry, that the mischief ought to be obviated, not by provisions designed for the mere mitigation of its consequences, but by removing its cause, that is, by limiting the power of imprisonment itself, and confining it to cases where it is warranted on the plain and just principle of preventing the debtor from fraudulently absconding, or removing his property beyond the reach of justice, or for the punishment of actual fraud, or compelling the debtor, after judgment, either to pay the debt, or to make a cession of the whole of his property for the benefit of his creditors. *Beyond this*, we believe that the practice of imprisonment for debt is neither warranted in principle nor beneficial in practice; and that on the contrary, whilst the exercise of the present almost unlimited power is productive of pecuniary loss, injury, and distress to creditors as well as debtors, it also occasions great

<sup>1</sup> Vol. 2, 321; Vol. 8, 70.

moral evils in its tendency to subdue that proper degree of pride and honest feeling which is inconsistent with the degradation of imprisonment in a gaol, and to level the distinction between guilt and misfortune."

We do not exactly see how such processes can be called *opposite*. Their joint operation was and is to declare, that any person not engaged in trade, who should contract debts without the means of paying them, should be deemed guilty of a wrong punishable with imprisonment at the instance of the injured party, but that the imprisonment should not exceed a short period, if he (the insolvent) proved that he had not been guilty of more dishonesty than is implied in the mere act of incurring debts exceeding his known means, and showed a willingness to compensate his creditors to the utmost of his power.

The passage, however, is carefully limited "*Beyond this, we believe,*" &c.—yet it is confidently cited as in point.

"We are of opinion (they continue) that this language applies with the greatest force to arrest on final process.

"The arrest of a debtor who is wholly insolvent is of no direct use whatever; and of this nature are the greater number of arrests in execution. An honest debtor who can pay, will do so before the costs of an action are added to his debt; or if he be under temporary difficulties, and have his liberty, he will exert himself to procure the means of payment. A dishonest debtor will probably avail himself of the facility which the laxity of the present law affords him to dispose of his property before the hostile creditor is able to seize it."

Nothing is here allowed for the effect of the law in checking profligacy or compelling the discovery and equitable distribution of property.

After quoting another passage from the Common Law Report, to the effect that the practical effect of the law of arrest on final process, combined with the Insolvent Law, is the imprisonment of numbers merely to be discharged without opposition at the end of a few weeks, with less disappointment or misery to both debtor and creditor, they proceed to found what strikes us to be a fallacious argument on the returns of the Insolvent Court, from which it appears

that not above one insolvent in ten is remanded for punishment. Mr. Law observes that many of the worst cases end in a *discharged forthwith*, this being often done when the insolvent has been reluctantly induced to make a full surrender of his property.

There strikes us to be great force in the following argument of Mr. Law :

“ A law, whose value is in the promotion of moral conduct, is not to be estimated only by the observation of those on whom its sanctions fall : yet such limitation is the vice of this argument which deals only with insolvent petitioners. It is stated in the Appendix to the Fourth Report to the Common Law Commissioners, that in one year there quoted, there were 5981 persons, against whom final process of arrest was issued from the superior Courts at Westminster ; and that of these, 453 were discharged under the Insolvent Debtors’ Act :—the same Return includes primary and final arrests ; and shows that of the two together, there were from those superior Courts warrants of arrest against 36,115 persons, of whom 1670 were discharged under the Insolvent Debtors’ Act. If so small a portion of those persons against whom this law of coercion is put in force, have recourse to that tribunal for the mitigation of it ; only 1 in 21 or 22 of those against whom *warrants of caption* were issued, coming to receive a discharge by that Court ; that law must be efficient for its purposes : a few may abscond ; a few may be forgiven their debts ; but payment must be the great resource for appeasing the anger of the law.

“ Let it be observed then, that those of whom this argument speaks are a small part of those who go to prison for debt ; they who so go to prison are but a small part of those against whom warrants are issued ; those against whom warrants are issued are but a part of those against whom judgment is recovered ; those against whom judgment is recovered are but a part of those who pay after being sued ; those who pay on being sued are but a part of those who pay after legal threats ; those who pay on legal threat are but a part of those who make reluctant payment in fear of the consequences of delay ; and those who pay slowly and reluctantly, are but a part of those who in the fulfilment of the duty which they owe to

their neighbours are influenced, some almost unconsciously, by the knowledge that there is a law which will at last visit with the loss of liberty, the neglect of that honest duty.

“Thus is the whole population benefited, and kept to a due sense of pecuniary obligation, by a knowledge of the law which can enforce it: and so little important to the appreciation of that benefit is the fraction of insolvent petitioners, who pay a dividend, or receive unfavourable judgments.”

The arguments of the Commissioners get worse and worse, and occasionally descend to downright twaddle, as we proceed. Thus we are told that “the *indiscriminate* imprisonment of judgment debtors is inconsistent with the very principle on which the insolvent law is founded.” The insolvent law being founded for the express purpose of discriminating, this proposition hardly needed the assistance of authority. Then we are told that the common law of England does not sanction any such principle; in other words, that it rests on the statute law, and is consequently of comparatively recent origin. A good argument enough for those who respect the wisdom of our ancestors, but an odd one for Mr. B. Hawes the younger, one of the most illuminated of the modern *illuminati*, to sanction by his signature. Lord Coke, too, is quoted to prove a great deal more than was wanted for the nonce.

Upon the statute of Westminster 2d, c. 18, Lord Coke observes that, at the common law, where a subject sued execution upon a judgment for debt or damages, he should not have the body of the defendant *or his land in execution* (unless it were in special cases); and the reason of the law (adds the sage) was, that the body in case of debt should not be detained in prison, but be at liberty, not only to follow his own affairs and business, but also to serve the king and his country when need should require; and taking away the possession of his lands would hinder his following his husbandry and tillage, which is so beneficial to the commonwealth.—Co. 2 Inst. 394.

Legislate on these principles and the landed interest will have no reason to complain. But if Lord Coke is good for personal liberty, he is equally good for the immunity of land.

The loss incurred by creditors in consequence of imprisoning their debtors is alleged to be very great; and the same may be said of the loss incurred by claimants in recovering any

claim whatever, or by prosecutors in bringing offenders to punishment. Debtors, too, it is urged, are actually put to a cost of six pounds each upon the average in getting out of prison; they themselves are all the time producing nothing, and lodged at the expense of the country; so that imprisonment is in itself an evil, and prisons are positively a charge on the public! We understand that there is a new sect just rising in America, called the no-human-government school, who think that the restraints imposed by law do more harm than good upon the whole. We earnestly recommend them to study this Report.

Mr. Serjeant Stephen had forcibly argued that, if the power of arrest were taken away, the creditor would be much more frequently defeated by the concealment of the debtor's property. "To this it may be answered, that the present state of the law affords no effective means of discovering the debtor's property, except in particular cases, and that the object of the law should be to afford such means of discovery by a direct, and not an indirect process.

"That imprisonment does not, in fact, reach or discover property in the great majority of cases which come before the Insolvent Debtors' Court, is manifest from the returns which we have already stated to your majesty, by which it appears that, in about 95 cases out of every 100, no dividend is paid to the creditors; and that, in about 86 cases out of every 100, not only is no dividend paid, but the prisoners are adjudged entitled to immediate relief."

Mr. Law has fully explained the nature of the fallacy founded upon these returns. It does not follow that no property has been produced because no formal dividend has been paid. As to the supposed adequacy of a direct process, none such has been proposed, and we know of none that would reach an unscrupulous debtor who had a given sum in cash and chose to keep it for himself. Cases have occasionally arisen, under the old law, where a debtor preferred living luxuriously in a prison to giving up his property; and innumerable cases will arise under the proposed law, where persons will procure credit on the strength of funds which it will be found impossible to reach. We could name more than one peer or M. P. who lives in furnished lodgings, drives about

in hired carriages, and gives nice little dinners to a select circle. They never seem to want money, yet nothing palpable or tangible presents itself when the bailiff appears with his *fi. fa.* It was truly observed by Don Cambronero, the respondent as to Spain, in the Appendix to the Fourth Common Law Report, that it is easy now-a-days to conceal fortunes and carry millions in a portfolio.

The following passages are also directed against Mr. Serjeant Stephen :

“ It has been urged that, if the power of arrest in execution be taken away, the debtor without property will have no inducement to make those efforts by which he now often succeeds in obtaining the means of payment.

“ To judge of this, it must be considered what are the efforts by which a debtor without property can speedily obtain the means of payment? and they will be found to be :—

“ By contracting new obligations by way of loans, or by importuning contributions from friends or relations : by purchasing goods on credit to be sold always at a loss in order to raise ready money : by discounts, the exorbitance of which will be proportioned to his distress : by postponing prior or equal claims, or other means ruinous to himself and injurious to his creditors.”

There is only a choice of difficulties. We must apply a pressure which may drive a man to dangerous expedients, or we must leave him without any. The fear of being made a bankrupt would operate in exactly the same manner on a trader. It is only persons not subject to the bankrupt laws who are to be left to take things coolly.

“ It has been further urged that, if the power of arrest in execution be taken away, the burthen and risk of realizing the property of the debtor will be constantly thrown upon the creditor, instead of being incumbent upon the debtor himself.

“ If it be desirable to leave the realization of his property to the debtor, we think he will effect it more profitably when at liberty than if confined within the walls of a prison.”

The debtor can realize his property more profitably, but will he realize for such purposes at all?

“Again, it has been urged that the abolition of arrest in



execution will encourage the practice of contracting debts improvidently, or with the direct purpose of defrauding the creditor, and will also encourage the debtor to dissipate property which ought to be applied to the payment of his debts.

“ Our observation leads us to a different conclusion. We believe that, with the improvident, the sanguine, and the speculative, the distant contingency of imprisonment in execution has little influence ; with the fraudulent, the probability that the creditor will not incur the expense and vexation of following out his ultimate remedy, the chance that the Insolvent Court will not discover his frauds, and the certainty that a very limited imprisonment, unaccompanied by penal restrictions, will be the utmost extent of his punishment, form essential ingredients in his calculation that he may incur debt with impunity.”

The sanguine, the improvident, and the speculative will equally calculate on escaping the penalties of crime ; but did any one ever dream of urging that penal laws have no deterring influence on that account ? It is surely too much to say that people will incur debts with equal heedlessness, whether they are liable to punishment at the suit of any one angry creditor or not. Imprisonment and public examination by the Insolvent Court are by no means so lightly and indifferently regarded by persons, however improvident, making the slightest pretence to character.

The corrupting effect of prison company might have been assumed without the presence of the Whitecross-street keeper, who was summoned by the Commissioners to bear testimony to the fact. His observations, moreover, apply principally, if not exclusively, to imprisonment under the authority of Courts of Requests ; and as regards them, we are not quite sure that we should not come to the same conclusion as Mr. O'Connell, who, impressed by the evils caused by the Small Debt Courts of his own country, has declared that it would be better that small debts should be irrecoverable, unless some cheaper and more effective tribunal than any yet discovered could be established for them.

The section concludes thus :

“ We think that by taking away a fancied and generally

delusive security and throwing the creditor more on his own caution in giving credit; by providing prompt, efficacious, and cheap means for the recovery of debts, the discovery of the property of debtors, the punishment of the dishonest and fraudulent debtor, and the relief of the honest but unfortunate, most effective aid will be afforded to the trading part of the community; the unwary will be deterred from the first steps of improvidence, and a wholesome and sound state of credit will be preserved.

“ We concur with the Common Law Commissioners in the opinion, ‘ that the personal appearance of the debtor for all the purposes of examination, of inquiry, and of punishment, in case of fraud, ought to be secured; and that these objects may be successfully attained by actual imprisonment or requiring bail, in case of fraud, and by imposing penalties on those who shall neglect to appear.’

“ We think it convenient here to state, that we agree with the Common Law Commissioners, that all property which may be distributed under the bankrupt law, should be available in execution.

“ The delay which necessarily takes place in procuring from London an order of a judge of one of your majesty’s superior courts to hold to bail a defendant who is about to quit England, has been found by experience to be injurious to creditors. The possibility of obtaining an immediate authority for apprehending a debtor, where there is probable cause for believing that he is about to quit England, is much wanting, particularly in the maritime counties. We think, therefore, that the power which is now vested in the judges of your majesty’s superior courts at Westminster, to order defendants to be arrested in certain cases, should be extended to judicial functionaries in the country.

“ We are also of opinion, that in order to enable a judgment creditor to make his execution available, he should have power to summon his debtor, or, if in custody, to have him brought up, for the purpose of examining him as to his property.

“ We conclude these observations on the subject of imprisonment for debt in execution, as it affects all members of society, with the strongest recommendation of its abolition, and

with the fullest conviction that this may be safely and advantageously conceded, if accompanied with the further remedies for creditors against the property of debtors, which we have humbly suggested to your majesty."

The best argument is suggested by the first sentence. There is no doubt that tradesmen are much too anxious to get and keep their customers upon their books, and the improvident are often tempted into purchases by the facility with which the evil day of payment may be postponed. It would do no harm occasionally to put the opposing creditor upon his oath, and make him state whether he did not give credit with the full knowledge that the debtor had no means, and in the expectation that friends, perhaps ill able to afford the sacrifice, would be persuaded to pay eventually. This consideration weighs with us far more than any or all of the topics put prominently forward in this Report. On the other hand, it is often extremely difficult to refuse credit without giving offence: a tradesman has no means of ascertaining how far a customer of ostensible property and respectability is already in debt to others; and the proposed measure is undoubtedly tantamount to a proclamation of impunity to scamps.

It is not unimportant to add, though the Commissioners take no notice of the circumstance, that, according to information contained in the Fourth Common Law Report, the judgment creditor has a remedy against the person in all the states of Europe except Portugal, and all the States of North America except Maine and New York.

*"Proposed Court.*—We proceed to recommend to your majesty the means best adapted, in our opinion, for the administration of the estates of all debtors who are unable to meet their engagements, and are made amenable to the law for the equitable distribution of their property.

"For this purpose we deem it highly expedient that one Court of Judicature should be established.

"That England and Wales should be divided into such number of districts as your majesty may think fit, and that the Court should consist of a sufficient number of judicial and other officers for the administration of this branch of the law in such districts. The importance of the jurisdiction to be

exercised, and of the questions to be decided ; the great diversity of interests to be protected, and the very large amount of money to be administered by the Court, require that it should be a Court of Record, holding such a position amongst the other judicial establishments of the country as to merit the respect and obtain the confidence of the public. We think, therefore, that the judicial offices should be of such a nature in permanency, in rank, and in emolument, as will secure the appointment of able and efficient persons, men of considerable standing and of acknowledged reputation in the profession of the law.

“ We also think that it would tend much to benefit the public service, if a system of gradation in rank and emolument were introduced in the judicial offices,

“ We think that the primary tribunals, both in London and in the country, should be constituted by any one or more of the judges of the Court, and that such tribunals should have (subject to appeal) a more extended jurisdiction in matters relating to the administration of the estates of debtors who are made amenable to the jurisdiction of the Court than the Commissioners of the Court of Bankruptcy now have. Much trouble, delay, and expense would be saved to suitors, by enabling them to procure, in the primary tribunals, many remedies which they are now obliged to seek at a heavy expense elsewhere.

“ In this opinion we are confirmed by nearly all the witnesses who have been examined by us, as well as by the memorial of the merchants, bankers, and traders of the city of London to the Lord Chancellor, for extending the jurisdiction of the Court of Bankruptcy.

“ The judges acting in the different districts should be auxiliary to each other, so that every inquiry may be carried on in the place most convenient to the parties and witnesses.”

It seems admitted on all hands that the country courts should be stationary, and that the ancient system is inapplicable to bankruptcy. The proposed accumulation of duties, therefore, is the only part of the scheme to which we feel at present any inclination to demur. It is probable that no cases will come before the Court except where there is property to

distribute. Still we suspect that twenty-two or twenty-three judges, allowing seven or eight for the metropolis, will have quite enough to occupy them without diverging from the immediate purpose of their establishment. It has been decided, after a good deal of useless questioning, that the judicial functionaries should have the powers incident to Courts of Record, including those of committal for contempt; and conceiving that although "a rose by any other name may smell as sweet," this may not be literally true of a court, they suggest that a new name, unconnected with any old or awkward associations, should be invented. The following have been mentioned to choose from: Court of Commerce, Tribunal of Commerce, Court of Commercial Justice, Court of Sequestration, Court of Account, Court of Adjustment, Court of Distribution, Court for the more effectual Recovery, &c. &c., Court in aid of Debtor and Creditor. The Commissioners, to judge from their questions, have a lurking kindness for the first, though they have not ventured to avow their weakness.

The proposed Court of Appeal is to consist of three of the metropolitan judges, from whom an appeal will lie to the Lord Chancellor. The proposed judicial force is thus contrasted with the existing one:

"The present judicial officers of the Court of Bankruptcy, and of the Court for the Relief of Insolvent Debtors, and of the tribunals for administering the estates of bankrupts in the country, are as follows:—

"Three Judges of the Court of Review.

"Six Commissioners of the Court of Bankruptcy.

"Four Commissioners of the Court for the Relief of Insolvent Debtors.

"Seven Hundred Commissioners of Bankrupts in the country, in 140 distinct courts.

"In the proposed new court, we consider that, in lieu of the above, about 22 or 23 judicial functionaries, with as many registrars attached to them, will be sufficient to discharge the duties of the court throughout England and Wales, together also with the duties of the judges of local courts for the recovery of debts."

The ministerial officers are to be centralized as much as

possible, and all registered proceedings, whether in town and country, are to be registered in town.

There is at present £486,000, in the three per cents. belonging to the Court of Bankruptcy, or, properly speaking, to the creditors of estates under process of distribution, and it is anticipated that a large sum will be collected in the country. "We calculate, therefore, that from the above, and other sources, there will be raised a sum amply sufficient for the maintenance of the proposed Court upon a just and liberal scale, without imposing any additional burthen on the finances of the country."

The dividends on the funds in question ought to be regarded as belonging to the suitors for the time being, but it is to be hoped that parliament will not grudge a few thousands for such an establishment when its fitness and expediency are made out.

Since these observations were written, a bill for the amendment of the bankrupt laws has been introduced by the Lord Chancellor. With his wonted judgment he has adopted only such of the Commissioners' suggestions as could be followed without risk, and cautiously kept clear of those which would have necessitated a sweeping change in the system. Thus, arrest on final process will continue as before, and there is no enactment involving the abolition of the Insolvent Court. The most important provisions are the following.

Instead of relying on local judges to be created under some bill to be passed hereafter, the Lord Chancellor provides for the appointment of additional commissioners, by whom country fiats are to be worked. For this purpose they will go circuits. Fiats may also be directed to provincial courts duly authorized. The Court of Review is retained, but is to consist of a single judge. A master is to be appointed for taxing all bills of costs in bankruptcy. Thirty official assignees are also to be appointed to transact the country business.

The following classes are placed within the purview of the bankrupt laws: livery-stable-keepers, coach-proprietors, ship-owners, carriers, auctioneers, apothecaries, market gardeners, cow-keepers, brick-makers, alum-makers, limeburners, and

millers. Lord Cottenham proposed to include attorneys, surgeons, school-masters, graziers and farmers.

The petitioning creditor's debt is reduced to 50*l.* in the case of one creditor; 75*l.* for two; 100*l.* for three or more. This alteration will have the effect of bringing a considerable number of small traders within the scope of the law.

In pursuance of the pet scheme of the Commissioners, it is provided that the trader may be summoned before the Court, and required, under pain of being declared a bankrupt, to give security or show that he has a sufficient answer to the demand. Other acts of bankruptcy are created; for example, signing an admission of a demand and not satisfying it within twenty-one days; not paying a judgment debt or complying with an order of a court of equity within the same time, &c.

To afford the trader an opportunity of contesting the adjudication, it is not to be advertised for five days, during which he is to be admitted to show cause, but at the end of certain periods (twenty-one days after the adjudication has been gazetted, if the trader is in this country) the gazette is to be conclusive.

The giving or withholding of the certificate is to be made the subject of discussion at a public sitting, at which all or any of the creditors may be heard; the decision resting with the Court. These are safe and for the most part satisfactory amendments. As an abstract of the bill has appeared in the leading newspapers, it is unnecessary to go further into detail.

*H.*

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## ART. II.—THE LAW OF SEPARATE ESTATE.

WITH a system so extensive and complicated as the law of England, there are necessarily interwoven many topics which, although they do not admit of very ample or varied illustration, are frequently subjects of discussion in courts of justice and affect interests of deep importance to families and individuals. A detail of all the minute circumstances arising out of each of these less prominent legal doctrines might, no doubt, afford materials for elaborate and curious discussion; but the student will find it infinitely more instructive, to detect, if possible, the general principles which have been established as being applicable to such points of jurisprudence. Of this description of legal subjects, too limited in their nature to demand copious illustration, but so frequent in their recurrence that they cannot, with propriety, be altogether overlooked, the doctrine of Separate Estate is unquestionably one of the most important.

The policy of protecting women in a state of coverture, suggested to the Court of Chancery the expediency of conferring upon them the capacity of sole enjoyment. The object of the doctrine was to modify the strictly legal consequences of marriage, and, at the same time, whatever might be the opinions entertained as to the soundness of the principles upon which it rested, to secure a suitable provision for married women. It was certainly recommended by convenience, and is, in all cases, to be liberally interpreted. It is in a court of equity that a *feme covert* is considered as a *feme sole*. It is competent to that court to act upon her property in the hands of her trustees, and therefore to treat her as having interests and being under obligations totally distinct from those of her husband. It was held, at a very early period, that a gift of the income of real or personal property, by deed or will, in favour of a woman for life, to her separate use, and exempt from the control of any husband, was effectual to secure to her the sole dominion over the income, during the existing coverture, if she happened to be married at the time of the gift taking effect, and, if unmarried, during every future cover-

ture.<sup>1</sup> Such a gift could only become operative to create separate estate, when coverture called it into action; and then the clause frequently introduced into such dispositions of property, for the purpose of restraining anticipation, to the nature and effect of which we shall subsequently have occasion to advert, became likewise operative, so as to render the benefit inalienable. The gift and the restriction originated in the same principles and aimed at the same practical end, viz. an independent provision for the wife, upon whom there was conferred not only the privilege of personal enjoyment, but also such a disposing power as could only be inherent in sole ownership. The moral power of the husband, however, could not be destroyed by an extinction of his legal rights: and accordingly other steps were found to be necessary before the object proposed could be satisfactorily attained.<sup>2</sup>

The usual, though by no means indispensable<sup>3</sup> method of creating such estate was, to vest the property in trustees for the separate use of the wife, and free from all marital interference. She is then, in respect of the property to which such trust extends, viewed, in a court of equity, as an unmarried woman, and is consequently clothed with a right of alienation; from the exercise of which, however, as well as from anticipation of the income, she may be restrained by the clause, to which we have already alluded, being introduced into the deed by which the trust is created. If it should appear, either from the nature of the transaction, as in the case of a settlement in contemplation of marriage, provided the husband is a party to it, or from the context of the instrument limiting the property of the wife, to have been intended that she should have the gift to her sole use, a court of equity will carry such intention

<sup>1</sup> *Harvey v. Harvey*, 1 Peer Williams' Rep. p. 125. Compare that case with the case of *Hulme v. Tenent*, 1 Br. Ch. C. p. 16. It would appear that it was not without difficulty that the doctrine was established.

<sup>2</sup> It may, once for all, be observed that, according to the civil law, husband and wife are two distinct persons, and may have separate estates, contracts, duties, and injuries. Accordingly, in the ecclesiastical courts, a woman may sue and be sued without her husband.

<sup>3</sup> *Major v. Lansley*, 2 Russell & Mylne's Rep. p. 354. It is to be observed, that wherever a gift is made to a married woman, for her separate use, without the interposition of a trustee, the husband becomes a trustee for the wife, it being a settled rule that a trust shall never fail for want of a trustee. Sugd. on Powers, p. 157.

into effect; and, if no trustees are named, the husband will be considered a trustee for her behoof.

Although technical words are not necessary to create separate estate,<sup>1</sup> provided it can be clearly shown that it was the intention of the testator to give such an interest to the wife, there are cases in which the Court has refused to put a construction to that effect upon the language employed. The right of the husband to participate in the property of his wife can be destroyed only by a manifest intention on the part of the testator to deprive him of that benefit. In the case of *Dakins v. Berisford*,<sup>2</sup> the brother of the defendant had bequeathed leaseholds to him, in trust to sell, and out of the proceeds to purchase, in his own name, an annuity for the life of the plaintiff's wife, and to pay the same "to her and her assigns." The plaintiff, living apart from his wife, claimed the annuity. The demand was resisted upon the ground that it was the intention of the testator that the wife should enjoy the annuity for her separate use, and that such intention was obviously implied in the direction given to the defendant to purchase, in his own name, in trust for the wife of the plaintiff. But the Master of the Rolls, Sir Harbottle Grimstone, was of opinion that he could not deprive the husband of his legal right to the annuity, there being no negative words in the will to exclude him. The mere intervention of trustees, therefore, is not sufficient to create even a presumption in favour of separate estate. A testator<sup>3</sup> bequeathed his residuary personal estate to trustees, in trust to pay a part, and, upon a certain event, the whole of the interest to his niece B., the wife of C., for life, half-yearly, and to apply the capital to such uses as she, whether sole or covert, by deed or writing, sealed and attested as thereby required, or by her last will and testament in writing purporting to be such, signed and published as therein directed, should limit and appoint; and, in case of no appointment, to the use of the legal representative of B., including her husband, if then living, in due course of administration. The husband became bankrupt; and the question arose, whether,

<sup>1</sup> Vide the language of Lord Hardwicke in the case of *Darley v. Darley*, 3 Atk. Rep. p. 399, where the word "livelihood" was held to be sufficient to indicate an intention of giving property to the sole and separate use of the wife.

<sup>2</sup> Ch. Ca. p. 194.

<sup>3</sup> *Lumb v. Milnes*, 5 Ves. p. 517.

on the one hand, the wife was entitled to receive the interest of the testator's residuary estate, *separate from and independent of her husband*; or whether, on the other, the assignees were, during her life, entitled to it. Lord Alvanley thought that the words of the will in question were not sufficient to give the interest to the separate use of the wife.

The point has sometimes taken another shape. Even stronger expressions than the preceding, without, however, the appointment of trustees, have been considered ineffectual to create separate estate. The case of *Wills v. Sayers*,<sup>1</sup> decided by Sir John Leach, and which has been subsequently, again and again, referred to as authority, was of this description. A. bequeathed to the defendant 600*l.* stock, upon trust, to apply the dividends for the sole and separate benefit of his daughter, the plaintiff, Mary Wills; and her receipts were to be sufficient discharges. The testator then bequeathed the residue of his personal estate and effects to the plaintiff, for "*her own use and benefit*." The question was, whether these last words conferred upon the plaintiff a separate estate; and it was held that they had no such effect. The grounds of the judgment were, that it could not be inferred that, as to the residuary bequest, the testator intended what he had not actually expressed: and that he was acquainted with the technical forms by which the right of the husband might have been excluded, and did not choose to adhere to it, was obvious from the fact of his having, with respect to another gift, appointed a trustee, and expressly directed the application of it to the sole and separate use of the wife.

That is not the only case in which the same principle was recognised by the same judge. The will of Thomas Marvin was partly in these words: "I give and bequeath unto my daughter Charlotte, the wife," *et cet.* "the sum of 200*l.*, to and for her own *use and benefit*;" and then the testator gave another sum of money, besides the rent of a house, to trustees, directing them to stand possessed thereof for the benefit of the said Charlotte and her children; and that the same should not be subject to the debts, engagements, or, in any manner, under the control of her husband. A commission of bankrupt issued against the husband, whereupon his assigns filed

<sup>1</sup> 4 Madd. Rep. pp. 409, 410, note.

a bill in Chancery, claiming the legacy of 200*l*. They contended that the words did not create a separate estate, and they relied upon the decision in the case of *Wills v. Sayers*. Notwithstanding a very able argument, however, by the present Vice Chancellor of England,<sup>1</sup> Sir John Leach, was clearly of opinion that the bequest could not be considered as a gift to the separate use of the wife.

It is unnecessary in this concise outline to specify all the modes of expression which have, in equity, been held to be inadequate to support a trust for the separate use of the wife. They vary according to the intentions or capacity of each party. There is a case of comparatively recent date upon this point. A testator<sup>2</sup> bequeathed his residuary estate to trustees, in trust to invest the same in real or government securities, and to pay the interest and dividends thereof to his wife, for her life, *to be by her applied* for the maintenance of herself and such child or children as the testator might happen to leave at his death. In these circumstances the question was, whether the testator's widow, who had married again, was entitled to the income of the property for her *separate use*. It was argued that it would be utterly impossible to give effect to the words "to be by her applied," *et cet.* without leaving to her the *sole* disposal of the property; that stronger expressions could not be used for that purpose, and that it would be unreasonable to suppose that the testator intended that, in the event of his widow marrying a second time, the provision which he had made for herself and her children by him, should be subject to the control of her second husband. But the Vice Chancellor could see no grounds for holding that the gift had been

<sup>1</sup> He referred, in the course of the argument, to the case of *Jones*, mentioned in that of *Lamb v. Milnes*, and to *Johues v. Lockhart*, cited in *Ex parte Ray*, 1 Madd. Rep. p. 406. In the latter case, as stated by Mr. Belt, 3 Bro. C. C. 383, the wife was held not to take a separate estate. The following case was likewise quoted: A., by will, gave to his daughter B., then the wife of C., his gold watch, jewels, *et cet. to be at her disposal and to do therewith as she should think fit*. The testator died; and, C. becoming bankrupt, it was contended that this was a bequest to the separate use of the wife, and not assignable by the commissioners of bankrupt. A case was, at the same time, stated as having been argued before Lord Chancellor Cowper, in which a devise to a feme covert "for her use and benefit" was held not to exclude the husband, because it was not for the *separate use* of the wife.

<sup>2</sup> *Warde v. Claxton*, 9 Simon's Rep. p. 524.

made to the separate use of the wife. The particular words had reference not only to the widow of the testator, but to all the children whom he might have by her; whereas, in the cases which are generally cited upon the subject, the sole object of bounty is the woman, who was actually married or about to be married.

The circumstance of the gift being made through the medium of trustees, while it is by no means a necessary ingredient, has always been considered a presumptive evidence of the testator's intention to create estate for the separate use of the wife, independently of all control on the part of the husband, and has served to lead the Court to attach a meaning to words which might otherwise, perhaps, have been thought insufficient to justify such an interpretation; and it is quite necessary that this should be kept distinctly in view, while estimating the precise weight to be given to the cases of *Lee v. Prieau*,<sup>1</sup> and *Adamson v. Armitage*.<sup>2</sup>

Various words have, *per se*, and notwithstanding any contrary intention which might apparently be collected from other parts of the will, been held effectual to give legacies to the separate use of a married woman. The gift of a legacy, for instance, to a married woman, with a declaration that "her receipt shall be a sufficient discharge to executors;" or "for her *sole* and separate use?"<sup>3</sup> or for "her *sole* use and benefit;"<sup>4</sup> or, "for her sole use;"<sup>5</sup> or, "for her own use and to be at her disposal;"<sup>6</sup> or, "to be at her disposal, and to do therewith as she shall think fit;"<sup>7</sup> or, "to be by her laid out on what she shall think fit;"<sup>8</sup> or, "for her own use independent of her

<sup>1</sup> 3 Br. Ch. Ca. p. 381.

<sup>2</sup> Cooper, p. 283. Vid. 19 Ves. p. 416.

<sup>3</sup> Darley's case, 3 Atk. Rep. p. 399. In Darley's case the legacy was given to the husband. Where a bequest ran in these terms, "to the sole" use of Mrs. Elizabeth Newman or of her children for ever, "a question arose whether Mrs. Newman took an absolute property in the same," that is, whether the words were to be considered "to Mrs. Newman *and* her children," so as to give her a share equally with her children; or whether, the bequest was to Mrs. Newman for life, and after her death, to her children; Lord Thurlow was of opinion, that the latter was the true construction. Vide the case of *Newman v. Nightingale*, 1 Cox, p. 341; and that of *Montague v. Nucella*, 1 Russell's Rep. p. 165.

<sup>4</sup> Adams v. Armitage, ante.

<sup>5</sup> Ex parte Ray, ante.

<sup>6</sup> Prichard v. Ames, 1 Turner & Russell's Rep. p. 222.

<sup>7</sup> Kirk v. Paulins, 7 Vin. Abr. 95, pl. 43. <sup>8</sup> Atcherley v. Vernon, 10 Madd. 531.

husband ;”<sup>1</sup> or to be paid into her own hands ;”<sup>2</sup> or, “ for her livelihood :”<sup>3</sup>—in all these instances, it was held that separate estate had been created. In *Tyrrel v. Hope*,<sup>4</sup> where the husband had signed a paper, by which he agreed that the wife should “ receive and enjoy the profits ” of a certain property, these words were held to imply a separate use to the wife, and to create a trust in the husband for her ; and in a bequest of bond and mortgage debts, to be delivered up to the married woman, the same effect was given to the words, “ whenever she should demand or require the same.”<sup>5</sup> It is worthy of remark, that a bequest to a woman of a fund with the interest thereon, to be vested in trustees, and the income arising out of it to be for her *sole* use and benefit, vests the capital for her separate use.

Words, however, which appear to have been employed only for the purpose of excluding the husband, will not be extended so as to affect the interests of other parties. A testatrix<sup>6</sup> gave to trustees, named in her will, three several sums of money to be invested in the public funds, or upon real securities, as to one third thereof, upon trust, for such persons and for such uses, trusts and purposes as her daughter A., the wife of B., should, notwithstanding her then present or future coverture, by deed or will appoint, and, in default of appointment, upon trust to pay the dividends or interest into the proper hands of A., during her life, for her sole and separate use, and not to be subject to the debts or control of her then present, or any future husband ; and from and after her decease, upon trust to assign the said trust monies to such person or persons, as would have been entitled thereto as her next of kin, at the time of her decease, under the statute for the distribution of the personal estate of intestates, if she had died sole and intestate, to the utter exclusion of B., as her administrator, or by right of marriage or otherwise. Another third part of the same sum was given upon similar trusts, and

<sup>1</sup> *Waggstaff v. Smith*, 9 Ves. 623.

<sup>2</sup> *Hartley v. Harle*, 5 Ves. 540.

<sup>3</sup> *Darley v. Darley*, ut supra.

<sup>4</sup> 2 Atk. p. 558.

<sup>5</sup> *Dixon v. Olmius*, 2 Cox, Rep. 414. Vide, among many other cases illustrative of the same principle, those of *Beable v. Dodd*, 1 T. R. 193 ; *Horseman v. Abbey*, 1 Jac. & Walk. p. 381.

<sup>6</sup> *Hardwicke v. Thurston*, 4 Russell's Rep. p. 380.



subject to similar provisos, for the separate use of her daughter D., and her appointees ; and the remaining third part was given for similar trusts, intents and purposes, and subject to similar powers &c., for the *separate use and benefit* of another daughter E., independent of any husband ; and, in default of appointment, for the separate use and benefit of the other daughters A. and D. respectively. The daughter E. was unmarried when the testatrix made her will ; but she subsequently married, and died during the lifetime of her mother, leaving an only child who was the infant defendant in the suit. The question in this case was, whether that child was or was not entitled to the one third which had been so given to her mother, or whether the legacy became lapsed by the death of E. in the lifetime of the testatrix ; or whether it ought to pass to such persons as would have been next of kin of E. at the death of the testatrix, supposing E. to have died intestate, and without having been married. Accordingly, the claim of the infant was resisted upon the ground that the gift was to such persons and for such uses as the daughter of the testatrix should by deed or will appoint, and, in default of appointment, to the daughter for life, to her *separate use*, and after her decease, to those persons who, if she had died unmarried, would have been her next of kin ; that it was, in substance, a gift to the daughter, although certainly so guarded as to protect the legacy from the marital power. The question was viewed by counsel in precisely the same light as it might have been, if the daughter had not married ; in which case, there being no child, the persons entitled to take would have been the next of kin of the daughter, supposing, of course, that she had died before marriage. Sir John Leach, however, considered the expressions, “as if she had died sole and intestate, to the utter exclusion of the husband,” to have been employed simply for the purpose of *excluding the husband*, and could not view them as affording any presumption that they were intended to *exclude a child*, and so admit a class of persons more remote and uncertain.

The principle upon which courts of equity seem uniformly to have proceeded in disposing of cases affecting the interests of married women, has been that of protecting their rights against the consequences of any injudicious acts upon their

own part, or any attempts, on the part of others, to acquire an absolute power over property to which they were alone entitled, and which had been bestowed upon them with a view to their own independent enjoyment of it. In all cases relating to the interpretation of wills, the intention of the testator is one of the very first elements which has to be ascertained, and once discovered, it serves as a key for the construction of the entire instrument: and in no cases has that rule been more strictly or faithfully applied by the judges of the Court of Chancery, than in those which claimed from them a favourable consideration for the comfort and welfare of married women. The Chancellors of England have been, at all times, unwilling to relax, even at the request of the parties themselves, their salutary control over this species of property; and an English equity lawyer may, with no small degree of satisfaction, point to innumerable cases in which, through the honest and stern, though frequently very painful discharge of its duty, that Court has, between conflicting feelings and interests, preserved property and the advantages flowing from the possession of it, to unsuspecting individuals who might otherwise have been induced, by the very strength of their affections, to hazard every thing to which they could look for future competency, in the hope of releasing those, who happened to be closely connected with them by common interests or domestic ties, from the weight of a temporary pressure of affairs. This, indeed was, one of the reasons assigned at the Rolls, by the late Lord Gifford, for refusing so to construe a will as to defeat the intention which the testator had in view, of securing to certain parties, during their lives, the interest of a large sum of money to be enjoyed "*separately and apart*" from their husbands.

. If in the case to which we now refer, it had been admitted that they took *quasi* estates tail in the sum, it would have become theirs absolutely, it would have passed to any person whom they might choose to marry, if no settlement was made; and at their death it would have gone to their personal representatives. The case is important, and cannot with propriety be overlooked.<sup>1</sup> It was as follows: F., a testator, having devised all the residue of his real and personal

<sup>1</sup> Vide *Smith v. Frederick*, Russell's Rep. vol. 1, p. 174.

estate to trustees upon trust, within six months after his decease, to raise £34,000, and having out of the same made a provision for the maintenance of his two daughters E. and S., during their minorities, directed that a moiety of the interest arising from it should be paid to each daughter, upon her attaining the age of twenty-one or marrying, for her *separate use*, during a term of 99 years, if she so long lived; and that, in case either of them died leaving no child or issue of a child, the whole of the interest was to be paid to the survivor for her separate use, during the remainder of the term, if she so long lived. The trusts were, that the interest, not exceeding a certain amount, was to be paid to Margaret Bathurst, until his two daughters E. and S. should attain a certain age or be married, whichever event should first happen, towards an allowance of £1000 *per annum*. The interest of the principal sum of £34,000 was to be paid to his daughters, share and share alike, and, in case of the marriage of both or either of them, as and for a separate and distinct provision for them, and each of them, and as such *to be paid to them and not to their respective husbands*, in case either of his daughters should die leaving no child or children. E. married M.; S. married N.; who died leaving several children, and S. married Smith. Her fortune was, by deeds of lease and release, settled to her separate use, and all her real estate was conveyed to trustees. Certain stocks, funds, and securities were, upon particular trusts, limited to her separate use. In no part of the settlement was any mention made of the sum of £34,000.

The marriage having been solemnized, Mrs. Smith made a will, executed according to the forms requisite to the due exercise of the power reserved to her, by which, after bequeathing an annuity of one hundred guineas, she gave to her husband all the residue of the money, and personal property over which she had a disposing power. Mrs. Smith was advised that, under the limitations in the will of F., she was entitled *absolutely* to one moiety of the sum of £34,000, as soon as the whole thereof should be raised. The object of the suit was, among other things, to have it declared, that a moiety of the stock should be transferred to her, *for her separate use*. She died. Her husband took out letters of administration to her.

Her real estates descended to her eldest son by her former marriage. Smith filed his bill, insisting that, either as her appointee or as her administrator, he was entitled to so much of the moiety of the £34,000 as had not been raised during the life of his deceased wife. He prayed, that what remained due for principal and interest, in respect of that sum, might be raised by the sale or mortgage of a competent part of the estate of F.; and that the sum due to the plaintiff, as appointee or administrator of his deceased wife in respect of her moiety, might be paid to him.

N., the principal defendant, submitted that, according to the true construction of F.'s will, the disposition immediately preceding the limitation to the testator's right heirs of one moiety of the £34,000 did not vest an absolute interest in S.; but that, in consequence of the prior limitation thereof, the same continued so far in suspense or expectancy, during her life, as to vest, upon her death, in him, N., as her heir in tail. The plaintiff contended that the limitation of the residue of the estate could not possibly, in respect of that sum of £34,000, be construed merely as a designation of the person who, after the death of the ladies, was to enjoy the fund. If the effect of the limitation had been to give to the daughters an estate for their respective lives, *to their separate use*, remainder, after the decease of each of them, to the heirs of their respective bodies, there might have been some ground for such a construction. But the words were such as to vest an estate tail in the daughters themselves. Each had a contingent interest in the moiety of the other, so as to render it advantageous to each to keep that moiety, at least, alive; and the limitation for the term of 99 years, subject to which they have the absolute property of the £34,000, securing the moiety to their *separate use* during coverture, the merger of the charge would have been the destruction of a separate and independent provision which had been made for them respectively. These views, however, were thus met. If leaseholds are limited to a woman, for life, to her separate use, and, after her decease, to the heirs of her body; or if, in a will, they are given to her, for life, to her separate use, and, after her decease, to her issue, she does not take a quasi estate tail in the chattel. The case in question, indeed, seemed to be less favourable than the analogous

cases of *Champion v. Pickax*,<sup>1</sup> *Sands v. Dixall*,<sup>2</sup> and especially *Price v. Price*,<sup>3</sup> to the claim of an absolute interest being vested in the person in whose favour the first limitation was made ; that first limitation being only for a term of years and not for life, the testator had clearly set apart the fund with a view to securing to his daughters a provision which should not be under the control of their husbands ; and to put such a construction upon the bequest as would give them the absolute property of the money, upon their attaining the age of twenty-one, or marrying, would be to defeat his avowed purpose. Since the interest of S., therefore, in the charge terminated with her life, the plaintiff, claiming through her, could not insist on having any further portion of it raised.<sup>4</sup>

The bill was, after mature consideration, dismissed.

In the case of *Roberts v. Dixwell*,<sup>5</sup> the principal question was, whether the trust was executed or executory. If the former, the daughter was tenant in tail, and her husband entitled by the curtesy ; the contrary, if the latter. It may be inferred from the language of Lord Hardwicke that an equitable estate tail in the wife is not inconsistent with a trust for her separate use, during her life, and that such *separate* trust of the freehold is not necessarily absorbed or merged in the general trust of the inheritance. There had been a devise to trustees to convey to the use of the testator's daughter, for the term of her natural life, and so as *she alone*, or such person as *she might appoint*, should take and receive the rents and profits thereof, and so as *her husband should not intermeddle therewith* ; and from and after her decease, in trust for the heirs of her body for ever. In the case of *Lady Jones v. Lord Say and Sele*,<sup>6</sup> in which a testatrix devised lands to trustees and

<sup>1</sup> 1 Atk. p. 472.

<sup>2</sup> 2 Ves. sen. p. 652.

<sup>3</sup> 2 Ves. sen. p. 234.

<sup>4</sup> In the case of *Price v. Price*, the husband, on his marriage, conveyed a leasehold to trustees to the separate use of his intended wife ; after her decease, to the use of the heirs of her body by the husband to be begotten ; and, for want of such issue, to the use of the husband and his heirs. The wife died, leaving an only son. Sir J. Jekyll held that the term vested in the heirs of the body of the wife, as purchasers. In reference to this case consult the remarks of Lord Hardwicke, 2 Ves. sen. Rep. p. 237.

<sup>5</sup> 1 Atk. Rep. p. 607.

<sup>6</sup> Vide *Fearne's Conting. Rem.* 7th Edit. p. 50 ; 3 Br. Parl. Ca. p. 458 ; compare 1 Eq. Abr. 383, c. 4, Vin. vol. 8, fol. 262, ca. 19. Lord Hardwicke is reported to have said (*Peck's Ca.* 1 Ves. sen. p. 47, vide likewise 2 Ves. sen. pp.

their heirs in trust out of the rents and profits to pay certain legacies and life annuities, and the residue of the rents and profits to her daughter, for her *separate use*, for life; and, after her decease, to stand seised of the land to the use of the heirs of her daughter's body, the Court is said to have decided that the use was executed in the trustees and their heirs, during the life of the daughter and no longer. But the late Mr. Butler doubted the soundness of the decision, on the ground that by such a construction the trustees were not clothed with such an estate as enabled them to execute the general trust reposed in them for payment of the bequests and annuities of the testatrix. It would be superfluous to detail the circumstances of a case which may be found not only in the Reports but even in popular text books. The material point was, whether, according to certain words, there was created merely a trust for the separate use of a certain party, or, whether the language employed ought to be construed as a use executed by the statute, so as to subject the interest in question to the control of her husband. Lord Chancellor King was of opinion that the use was executed in the trustees and their heirs, during the life of A., and that she had only a trust in certain rents and profits during her life; but, at the same time, that, by subsequent words, the use was executed in the person entitled to take by virtue thereof, chargeable with the payment of certain annuities; and therefore, there being only a trust estate in the ancestor, and an use executed in the heirs of her body, these different interests could not unite so as to create an estate tail, by operation of law, in the ancestor.<sup>1</sup>

118, 119) that under a trust a contingent interest might go to the executor or administrator, although not vested in the person during his life. The same principle was applied in the following case: A., in consideration of natural love and affection for her niece, and to secure to her *separate use* her personal estate, after her own decease, granted all her personal estate to trustees, in trust for herself during her natural life, and after decease, on payment of her debts and funeral expenses, in trust for the *sole and separate use* of her niece alone, and not for her husband, or for such person as she should appoint. The niece died in the lifetime of A., whose executor and residuary legatee, upon her death, filed a bill against the personal representative of the niece for the personal estate. It was determined that the contingent interest ought to go to the representative of the niece. Vide *Fearne's Conting. Rem.* p. 559.

<sup>1</sup> Upon an appointment of lands, to be purchased with trust monies, to the use of the testator's daughter during her life, *for her sole, and separate and peculiar use*,

It has been already observed, that a married woman is considered as a feme sole in respect of property settled to her separate use. This principle is applicable to property in reversion as well as property in possession.<sup>1</sup> A power of sale, therefore, unless specially excluded by the terms of the instrument, seems to be inherent in her, unrestricted, too, even by that sort of examination which has been held to be necessary in cases where a married woman is parting with her equity. Attention was drawn to this point in the cases of *Witts v. Dawkins*,<sup>2</sup> and *Sturgis v. Corp.*<sup>3</sup> The principle established is, that if a woman happens to be, as to a certain property, a feme sole, and, as such, has a disposing power, she has that disposing power as completely over her reversionary interest as over her interest in possession. In the latter of these cases trustees were appointed to pay and apply the dividends and annual profits of certain Bank Annuities, after the death of Ann Sturgis into the proper hands of Martha Sturgis, for *her sole and separate use*, for and during the term of her natural life, and not to be subject or liable to the debts, contracts, or engagements of her husband, &c. The husband of Martha purchased the reversionary interest in the capital of those Bank Annuities after the death of Ann Sturgis and Martha Sturgis. Then the husband and wife put up to sale, by public auction, the reversionary interest in the Bank Annuities.

remainder to her children, &c., it was held that, in order to effect the testator's general intention, an estate tail was to be considered as vested in her, with reference to the lands directed to be purchased. Accordingly, the Court directed the money to be laid out in lands, to be settled to the use of trustees in trust for her and the heirs of her body. Vide *Pitt v. Jackson*, 2 Bro. Ch. Rep. p. 51. Useful hints will be found in the cases of *Garth v. Baldwin*, 2 Ves. sen. p. 646; *Doe d. Leicester*, 2 Taunt. p. 109; and *Gregory v. Henderson*, 4 Taunt. p. 772.

<sup>1</sup> In the case of *Stamper v. Barker*, the wife had a contingent reversionary interest in a sum of long annuities, and a vested reversionary interest in a sum of 3 per cent. stock. The husband and wife agreed to separate; whereupon they executed a deed by which they assigned both species of property to trustees, upon trust, as to one moiety of the fund, for the husband absolutely, and as to the other moiety, for the *separate use* of the wife absolutely. The husband, by his will, disposed of that moiety of long annuities and stock, of which the trust had been declared for him, and died, leaving his widow surviving. The reversionary interests having fallen into possession, it was held that the wife's title by survivorship to the whole fund was not affected by the deed. 1 Russell, Ch. Rep. p. 71; 5 Madd. p. 154.

<sup>2</sup> At the Rolls, in 1806, 12 Ves. p. 501.

<sup>3</sup> 13 Ves. p. 190; Vide 1 Ves. p. 194; notes, 5 Ves. p. 17.



Corp was the purchaser; and, upon an objection taken by him to the title, a bill was filed by the husband, Sturgis, and his wife, praying a specific performance of the contract. The defendant insisted that a proper assignment of the reversion could not be made to him without the private examination of Martha; and the answer to the objection was founded upon the principle, that a married woman is, as to property *settled to her separate use*, a feme sole, to all intents and purposes; provided the instrument does not positively restrain her power of appointment or sale. In the case in question there was no restriction upon the limitation to the separate use.<sup>1</sup>

To state the particular circumstances of every case, would extend these cursory remarks to an undue length. It may be observed, however, that much useful information may be gleaned from the argument in *Witts v. Dawkins*; where the sale of the separate estate of the wife by herself and her husband was established. In that case, the language creating the separate estate was very strong: "*For her sole and separate use and benefit, exclusive of her then intended husband, who was not to intermeddle therewith.*" The wife contracted to sell her interest to the defendant, who had scruples about fulfilling the agreement, although he was willing to do so, if a good title could be made to him. A bill was filed, praying a specific performance of the contract for the purchase of the separate estate; and it was decreed by Sir William Grant accordingly.<sup>2</sup>

Although in questions of this nature Courts of Equity have ever been jealous of the interference of the husband, it may easily be imagined that it is not, upon all occasions, an easy matter to detect, or when detected, effectually to prevent collusion between himself and his wife, entered into for the very

<sup>1</sup> It appeared, in the course of the argument, that the bill had been filed before the case of *Witts v. Dawkins* had been decided. The counsel for the defendant attempted to rely on the distinction that the interest was reversionary.

<sup>2</sup> Under a bequest of stock, in trust to permit a woman to receive the dividends for life, to her sole and separate use, and to pay the same into her own proper hands, and that her receipts should, from time to time, be sufficient discharges; a sale by her of part of the dividends was established. Vide *Brown v. Like*, 14 Ves., p. 302. There the words were, "for her own sole and separate use and benefit, notwithstanding any husband she might happen to marry; and to pay the same into her own proper hands, for her own separate use and benefit."

purpose of defeating the prudent and friendly objects which the testator had in view, and of defrauding, it may be, from motives of personal selfishness, the woman whose interests he was bound to protect. Whatever suspicions the Court may have against such transactions, the proof adduced seldom amounts to any thing stronger than presumption: and upon presumption a court of justice cannot act. If it can be shown that improper influence has been exercised over the wife; or that she has, for instance, been frightened by cruel treatment, or deluded by misrepresentations, to the joining with her husband in risking or sacrificing her separate property, a Court of Equity would set aside the dealings between the parties; but the *rule* is, that where any thing is settled to the separate use of the wife, she is considered as a feme sole, and may appoint in what manner she thinks proper, even without the sanction of her trustees, unless their concurrence be specially provided for in the deed. These principles were distinctly recognized by Lord Hardwicke in the case of *Grigby v. Cox*;<sup>1</sup> although, at the same time, he admitted that the purchaser would have acted more prudently if he had taken the precaution to talk over the matter with the trustees. He was subsequently called upon to consider precisely the same point, and, after mature reflection, he adhered to his opinion, repeating the maxim, that a married woman<sup>2</sup> being, in respect of property settled to her separate use, considered a feme sole, she might dispose of it. Her father had by his will clothed her with that character by giving her certain interests to her "sole and proper use during her life, and to be at her disposal, and not subject to the debts or control of her husband."<sup>3</sup> In another case, where a wife, having separate property, joined in a security for money advanced to her husband, a defence of undue influence was set up. The Court acted upon the security, not as an agreement to charge her separate property, but as an equitable appointment under a settlement, to be satisfied not by sale or mortgage, but out of the rents and profits of the property. Sir J. Leach suggested that he knew of no case, in which it had been decided that a Court of Equity would compel a feme covert specifically

<sup>1</sup> 1 Ves. Rep. p. 517.

<sup>2</sup> *Hearle v. Greenbank*, 1 Ves. sen. p. 299.

<sup>3</sup> *Field v. Fowle*, 4 Russell's Ch. Rep. p. 112.

to perform a contract for sale or mortgage, and that the Court acted upon her separate property by considering a security, in which she joined, as an appointment. He could not, without the consent of the defendant, order the property to be either sold or mortgaged. Accordingly, the decree was for satisfaction out of the rents and profits.<sup>1</sup>

It has been held that a wife may, by joining in a bill with her husband, appoint her separate estate for his debts;<sup>2</sup> that is, if a feme covert, having power to receive the profits of an estate to her separate use, and to appoint such profits in any manner she should think proper, files a bill, jointly with her husband, for an account, and submitting that the profits should be applied to the payment of the debts of the husband, and a decree to that effect is made, the bill to which she is thus a party, without collusion, is as much an execution of her power as an actual appointment would have been. The profits, in that event, will be bound by the decree.

Such is a rapid, though, we trust, not altogether faint outline of a few of the most prominent topics connected with this important and somewhat intricate doctrine of English law. The student ought, for himself, to consult the particular cases from which the materials of this essay have been principally drawn; there being few of them which do not present the general principles under a combination of circumstances and qualified by peculiarities which are not to be found elsewhere. Analogous they frequently are, but seldom exactly similar.

The subject, however, is not exhausted; and we shall take an early opportunity of resuming the discussion of it.

*E. R.*

<sup>1</sup> As a point of practice it is not unworthy of remark, that a decree may be made by consent in a cause, relating to the separate property of a married woman, in which she and her husband are co-plaintiffs. A doubt as to the regularity of such a proceeding having been expressed by the Registrars in the case of *Stinson v. Ashley*, (*Russell's Ch. Rep.* vol. 5, p. 4), Sir John Leach was of opinion that the cause might be heard by consent, and ordered the decree to be drawn up.

<sup>2</sup> *Allen v. Papworth*, 23 Nov. 1748. Vide 1 Ves. 164; 2 Ves. 191.

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## ART. III.—PRACTICAL POINTS.

I. *A Judgment v. An Equitable Mortgage.*

LORD COTTENHAM'S judgment in *Whitworth v. Gaugain*,<sup>1</sup> has naturally enough strongly excited the attention of the public. The facts were briefly these, George Cooke, a solicitor, having obtained a loan of money from certain bankers, deposited title deeds of property with them with a memorandum in writing that they were deposited in pledge to secure to the bankers the repayment of the sum lent with interest, and that he, Cooke, engaged if required to execute any legal mortgage or other security of the premises and land to the bankers. After this deposit, actions were commenced by two parties against Cooke which were not defended, and Cooke signed cognovits in both, and judgment was forthwith entered up against him, whereupon elegits were sued out and the creditors were put in possession each of separate parts of the property comprised in the deeds deposited with the bankers. The bankers then filed their bill in chancery charging that the judgments were concerted and fraudulently obtained, and that the elegits were void. The Vice Chancellor Shadwell granted an injunction, and on an appeal to the Lord Chancellor he entered fully into the question, and after discussing the evidence as to the fraud imputed his lordship observed, "At the bar, however, in the argument, a totally different turn was given, or attempted to be given, to the plaintiffs' case. It was attempted to be said, that at law, independently of the question of fraud, that by law the plaintiffs had a preferable title to the defendants. Now, if that be so, it is quite immaterial to the plaintiff whether the elegits were fraudulent or not; in short, it would be a hopeless piece of fraud to manufacture that, which, when manufactured, would have no effect against the plaintiffs' equity. It is clear therefore, that was not the ground on which the bill was filed. The bill prays that these judgments and elegits may be set aside as fraudulent and void as against the plaintiffs, with which the plaintiffs had nothing whatever to do, if they stood in the situation in which they had a preferable equity, an equity which would give them a preferable title as against the title now claimed by the defendants. It is quite sufficient for

<sup>1</sup> 5 Jur. 523.

the present purpose to say, that is not the case made. It is on totally different grounds. It is not made in the pleadings, it was not made in the argument before the Vice Chancellor, and it is only suggested when it comes to be argued before me. I therefore abstain from going further into that case than to say that if such a point had been made; if the bill had been framed for that purpose, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could interpose by interlocutory order; because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which, under the authority of an act of parliament, they had a right to hold, the *elegit* being the creature of an act of parliament, and therefore they have a parliamentary title to hold the land as against all persons, unless a case of equity should be made to induce this Court to interfere."

We must first advert to the nature of the title acquired under a judgment and an *elegit*. A judgment creditor has by act of parliament a title to take a moiety of the land his debtor had at the time of the judgment or after, and when he is put in possession under an *elegit* he has it is clear, with all deference to the words we have just quoted, to all intents and purposes an estate, and a legal estate, too, though only a chattel interest.<sup>1</sup> This, then, appears to have been the difficulty which presented itself to the Chancellor's mind; here is a party in possession with a legal title—and without notice how can any equity prevail against him? This is plausible, but we confess we think not well grounded. The question however is also raised in a note in Coote's *Mortgages*.<sup>2</sup>

A trust estate as distinct from a legal estate in the same lands is recognized and protected in the Court of Chancery; and that Court will not permit the beneficial owner of the trust estate to be damnified by any act or claim of or under or through the trustee except in the case of a person who shall have contracted with the trustee for the trust property specifically, and shall have paid his money without notice of the trust. In illustration of this, we may refer to the familiar case of a widow of a trustee seised in fee claiming dower. At

<sup>1</sup> 2 Inst. 396; 2 Saund. 68, c.

<sup>2</sup> Page 254.

law she has a clear title to dower out of the trust property, but chancery steps in for the protection of the cestuique trust and restrains her, not because she had notice of the trust or that her title is not founded in a good and valuable consideration, but because she did not contract for the trust property specifically, and because it would be inequitable to give her dower out of the beneficial ownership of a stranger.<sup>1</sup> Here, then, is a case of a legal title giving way to a mere equitable estate. And if lands be conveyed to and to the use of A. and his heirs in trust for B. and his heirs, it is clear that a judgment against A., though good at law to charge the lands, could not avail against them in chancery.<sup>2</sup> And to entitle a cestuique trust to this protection, it matters not, we apprehend, how the trust be constituted, if only he comes in *bonâ fide* and for a sufficient consideration. Suppose on a purchase by A. the lands are limited to him in fee, and that subsequently for a valuable consideration he agrees in writing that B. shall have the profits during his life, and that afterwards A. marries or contracts a debt for which the creditor sues and gets judgment, we think without doubt that neither the wife nor the judgment creditor could take the land during the life of B. We come now to the case of a man seised in fee agreeing upon a loan of money that the same shall be a charge upon the lands, does not the lender acquire under such an agreement a beneficial interest in the lands, and does not the legal owner become to the extent of the charge a mere trustee? It cannot be contended that chancery looks to the words or mode in which a trust is constituted, it regards only the substance; and if a party can show that he has bargained and paid for a specific property, the acts of the legal owner of that property cannot afterwards affect him, with the single exception we have before noticed. Now, it is a clear doctrine of equity that a deposit of title deeds without any accompanying agreement is of itself evidence of an agreement executed for a mortgage of the estate, and that the party with whom the deeds are deposited may file his bill for a conveyance of the legal estate.<sup>3</sup> It seems, then, impossible to contend, consistently with established rules, that a subsequent judgment creditor of

<sup>1</sup> *Hinton v. Hinton*, 2 Ves. sen. 634.

<sup>2</sup> 1 Sanders, U. & T. 351.

<sup>3</sup> Coote on Mortgages, p. 217.

the debtor can destroy or supplant so clear an equitable title. For how can the judgment creditor bring himself within the only exception which the Court of Chancery has as yet admitted? He may perhaps allege that when he gave credit he had not notice of the equitable title, but he cannot say, and this is absolutely necessary, that he contracted for the specific portion of his debtor's property. We have as yet discussed only the reason and principle of the question, and we will now show that our conclusion is fortified by excellent authorities. The first case to which we shall refer, is *Burgh v. Francis*, reported in several books, and in 3 Bacon, Abr., title Mortgage, p. 643, the reason of the decision is fully stated, and it is simply this, that a creditor, though he may obtain a judgment and an *elegit*, does not originally take hold of the land at all, and therefore should be postponed to a party who before the judgment gets an equitable title to the land. From this and other cases cited by him, the author of the Abridgment states, as a sure and established rule, that "if a man mortgage by a defective conveyance and there be subsequent debts that do not originally affect lands, then the defect of such a conveyance shall be supplied against a subsequent incumbrancer that acquires a legal title afterwards; for since the subsequent incumbrancer did not originally take the lands for his security nor had in his view an intention to affect them, when afterwards the lands are affected and he comes in under the very person that is obliged in conscience to make the security good, he stands in his place and shall be postponed to such defective conveyance." So far as regards the principle of this rule it is plain, it matters not *how* the security of the mortgagee is defective; within its reason every security is defective which allows a judgment creditor to acquire the legal estate under an *elegit*. We need not trouble our readers with citing any of the other older cases mentioned in Bacon; we shall now refer to *Averall v. Wade*,<sup>1</sup> decided in Ireland by Lord Chancellor Sugden, which involves the very point. Judgments are entered up against A., seised of Greenacre and Whiteacre, and afterwards A., upon the marriage of his son, settles Greenacre, with a covenant that it was free from incumbrances. It was decided that the parties under the settlement, which was defective and did not

<sup>1</sup> Rep. temp. Sug. 252.



confer the legal estate, had an equity to hold Greenacre free from the judgments and to throw them entirely upon Whiteacre, which was sufficient to satisfy them, and that subsequent judgment creditors could neither supplant this equity, nor yet establish any title to charge Greenacre, though the legal estate remained in A. and could have been obtained under an *elegit*.

It should be observed that if Lord Cottenham's doctrine is true, it does not only affect mortgages by a deposit of title deeds, but all mortgages which do not confer the legal estate, but we are persuaded that the rules of equity to which we have referred, independently of the decided cases, are too strong to be easily shaken, and we are confident it will still be held to be against conscience and right that a cestuique trust should be injured by any person who has not been actively deceived by the trustee.

## II. *Execution of Wills.*

"No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned, that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The many distressing and disastrous cases which are constantly occurring from ignorance or inattention as to the execution of wills, induce us to give a few plain directions how a will may be safely executed and attested, and we trust we shall be able to move our readers to assist in disseminating useful information on the subject. We will first advert to some of the principal decisions which have been made on the text we have chosen.

The will must be *signed* by the testator, or by some other person on his behalf. It has been decided that if a stranger signs *his own name*, that satisfies the act.<sup>1</sup> This is certainly rather wild work, and approaches to an absurdity. It seems to follow, that a testator himself may not only sign by a mark, but may *pro hac vice* adopt any other name he pleases.

<sup>1</sup> 2 Curt. 329.

A will must be signed *at the foot or end*. A will just filled the first three pages of a sheet of paper, and the signature was found at the bottom of the fourth page, which was, with the exception of the signature, wholly blank; it was held sufficient, the judge saying, that if not at the foot it was at least at the end. This may be doubted; the signature was at the foot or end, not of the will, but of a blank space. But, then, it may be asked, who is to decide as to the extent of space which may be safely left between the body of the will and the signature? The decision may be supported on the ground that there was only one sheet of paper; and we think if the will had been written on several sheets, and the signature had been at the foot of a blank sheet, it would not have been valid. In such a case where the copyist brings the writing to the very extremity of a page, the signature should be at the top of the next page, prefaced for caution's sake by such words as these, "this is the end of my will written on the — preceding pages or sheets of paper."

It has been decided, that a deed or document, in existence when a will is made and referred to thereby, may be read as part thereof, though the same is not present when the will is made.<sup>2</sup>

*Reddendo singula singulis* the act requires, that a signature, if made by the testator himself, must be made, and not merely acknowledged, in the presence of the witnesses; but it has been decided, that an acknowledgment of a signature in such a case is sufficient.<sup>3</sup>

It has been decided, that the deputy to make the testator's signature may be one of the witnesses,<sup>4</sup> and there does not appear any good reason why he should not; but a doubt to the contrary was started by one of the commentators<sup>5</sup> on the act.

In the presence of — does this mean in the sight or seeing of the witnesses and testator respectively? not universally certainly, for a testator may be blind. But may a blind man be a witness?<sup>6</sup> Certainly not. For the act emphatically requires *that* the witnesses shall *attest* the will, that is, shall witness or see the signing by which the writing before them is made the will of the party signing. See Johnson, and Ency-

<sup>2</sup> Countess of Durham's case, 6 Jur.

<sup>4</sup> 1 Curt. 914.

<sup>3</sup> 2 Curt. 334.

<sup>5</sup> Sugden.

<sup>6</sup> 2 Curt. 320, and 395.

clopædia Metropolitana, and other Dictionaries, for the word attest. Vossius thinks the word is from *θεσθαι*, to put or place a person, sc. to see or witness. This shows the propriety and importance of the word attest as used in the enactment before us, though some of the commentators on the act appear to have been puzzled by it. The act, however, would have been more correctly expressed if it had said, shall attest the signature of the testator, and shall subscribe his will in his presence.

No form of attestation is necessary; that is, the witnesses having attested need not use any form of words; they may be dumb.

The signature of the testator must be made in the presence of both the witnesses, and it has been said, they must both subscribe at the same time, and undoubtedly the correct practice is for the whole factum to be a simultaneous act.<sup>1</sup>

We will now give our form, and we may observe it requires not what is barely sufficient, but what is undoubtedly safe and most convenient in practice.

### *Execution of a Will.*

Every person should know how to sign and witness a will so that it may be valid; daily experience shows how important such information is. And there is not any difficulty or mystery in the matter, it only requires a little attention.

Every will and codicil, whether devising large estates or the most trifling sum of money or article of furniture, requires to be signed and witnessed in the same way. It must be signed *at the foot or end* just as a letter is signed; if the party uses his ordinary signature it is enough. If the testator, whether from weakness or any other cause, cannot write his own name, he may sign by a mark, or his name should be written *by some other person in his presence and by his direction*. Such "other person" should merely write the name of the testator and should be a person who does not take any benefit under the will, but he may be one of the witnesses, though it is better that he should not.

The signature required, if made by the testator himself, must be *made*, or if made by another person must be *acknowledged, in the presence of two or more witnesses present at the same time*. That is, two persons, who take no benefit under

<sup>1</sup> See 2 Curt. 331.

the will, should at the same time see the signature *made*, or hear the testator acknowledge or adopt it as his own.

And the witnesses, before they quit *the presence of the testator*, **MUST** both sign their names under the will, and instead of merely signing their names, they should sign a declaration or memorandum showing that all things have been rightly done. Such memorandum should be written opposite to the signature of the testator, or under it.

We will now give a short form of a will, not for the purpose of inducing any one to make his own will, but in order to illustrate our instructions:—

This is the last will of me John Clark, of Newcastle-upon-Tyne, butcher, made this 2nd day of December, 1841: I appoint my only son John, and my daughter Alice, the executor and executrix of this my will: I give to my daughter Alice all my household goods and furniture, and the sum of 200*l.*; I give to my son John all my lands and houses, and all other my real estate, and all the residue of my personal estate, after the payment of my debts and funeral expenses, and of the said legacy. In witness whereof my name is signed at the foot or end of this my will by me [*or*, by John Hulme, of Newcastle-upon-Tyne, surgeon, in my presence and by my direction, which signature I acknowledge].

JOHN CLARK.

The signature at the foot or end of the foregoing writing was { <sup>made</sup> acknowledged } by John Clark, of Newcastle-upon-Tyne, butcher, in the presence of us present at the same time, and we in his presence, and in the presence of each other, have attested and do subscribe the same as his last will.

*Jacob Dawson.*

*Edward Spink.*

### III. *Voluntary Assignments of Debts.*

Several cases on this subject have lately been before the Courts, and the frequency of litigation with respect to voluntary settlements or assignments of *choses in action*, shows that the law on the subject either is not well settled or not well understood. And upon looking into the cases we certainly

do not think that the principles upon which the Courts have acted have been so clearly stated as they might. We will now state very briefly the results of the decided cases, and the principle upon which the Courts have acted. In all such cases the first inquiry should be, whether the *choses in action* be legal or equitable, and next whether everything has been done by the assignor to effect a complete transfer of his right and interest to the assignee. Thus it has been decided that a mere assignment of stock in the public funds standing in the name of the assignor, and which was not followed by a transfer in the books of the Bank of England, did not entitle a volunteer to claim the stock.<sup>1</sup> And this was on the ground that the mere deed of assignment did not pass all the estate and interest of the assignor in the stock, the Lord Chancellor observing, "Where a deed is not sufficient in truth to pass the estate out of the hands of the conveyer, but the party must come into equity, the Court has never yet executed a voluntary agreement. To do so would be to make him, who does not sufficiently convey, and his executors after his death, trustees for the person to whom he has so defectively conveyed; and there is no case where a Court of Equity has ever done that. Whenever you come into equity to raise an interest by way of trust you must have a valuable or at least a meritorious consideration. Nothing else will do."

So it has been decided that a mere assignment of a bond debt, though accompanied by a delivery of the bond, was not sufficient to entitle a volunteer either as against the assignor, or the obligor in the bond, to receive the debt.<sup>2</sup> And why? Because the legal interest in the debt still remained in the assignor. It may then be asked, how a voluntary settlement of a legal *chose in action* can be effected? Would notice of the assignment to the debtor be sufficient? We think not. We think there should also be the express assent of the debtor; for that alone would enable the assignee to sue in his own name, and alone would divest the assignor of his legal right to recover or release the debt.

We will remark that we are speaking only of *voluntary* assignments, for it is quite clear that a mere assignment of even a legal *chose in action* is sufficient if there be a valuable consideration, for in such a case a Court of Equity would compel

<sup>1</sup> Colman v. Sarrel, 1 Ves. jun. 50.

<sup>2</sup> Edwards v. Jones, 1 Myl. & Cr. 226.

the parties to make it effectual. We apprehend a merely meritorious consideration would not be sufficient, for Lord Chancellor Cottenham has said,<sup>1</sup> "My impression is, that the principle of the Court to withhold its assistance from a volunteer, applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement:" and in that case the parties claiming were the daughters of the settlor.

The principle which we have indicated shows that a mere assignment of an equitable *chose in action* is sufficient to entitle a mere volunteer to the benefit of it, because the deed of assignment in fact passes the whole right and title of the assignor. Thus in a case where A. B., being entitled to a reversionary interest in a share of a sum of money settled on his father's marriage, and which was vested in trustees, assigned his share of the trust fund to other trustees upon trusts which were voluntary; it was held, that the *cestuis que trusts* were entitled to the benefit of the assignment, on the ground that A. B. had done all he could to perfect his assignment, and that his assignment in fact passed his whole estate and interest in the fund.<sup>2</sup> It does not appear that the trustees of the settlement fund had notice of the assignment by A. B., and it does not seem to have been regarded as at all material whether notice was given or not.

We should mention that there is a case<sup>3</sup> in which it was held that a voluntary assignment of a life policy of assurance was sufficient, though the assent of the office to the assignment was not had, but the true ground of that case is, that the deed of settlement of the office empowered insurers to assign policies, so that this general provision was held sufficient to authorize an assignment without a particular assent.

It may be asked, if a party, after making a voluntary assignment of a bond debt, should die before the debt is paid, whether his executors should refuse to ratify the assignment and enforce payment of the debt, and we think they should not, unless assets are wanting for payment of debts. In considering the question the executors may properly regard the debt assigned as a legacy.

W. C. W.

<sup>1</sup> Jeffreys v. Jeffreys, 1 Cr. & Philips, 141.

<sup>2</sup> Sloane v. Cadogan, Sug. V. & P. Appendix, No. 27, and see Collinson v. Patrick, 2 Keen, 123.

<sup>3</sup> Fortescue v. Barnett, 3 Myl. & Keen, 36.

## ART. IV.—ON THE CONSTRUCTION OF EXECUTORY BEQUESTS.

It has long been settled, with respect to bequests of personal estate given upon a contingency, that if the contingency relates only to the time of the payment or enjoyment of the bequest, such an interest is so far vested in the legatee as to be transmissible to his representatives as to entitle them to the benefit should the time of payment ever arrive. Thus, in case of a devise of 100*l.* to J. S. at twenty-one years, and if he died under that age then to A. B. Though A. B. should die in the lifetime of J. S., if he, J. S., afterwards dies under twenty-one, the personal representatives of A. B. are entitled.<sup>1</sup> In *King v. Withers* just cited, the testator gave to his daughter an additional portion charged on his real estate in case of his son dying without issue living at his death. The daughter married and died in the lifetime of the brother, but he afterwards died without issue, and Lord Talbot decreed in favour of the husband of the daughter. His lordship gave an elaborate judgment, and part of his observations may properly be extracted. It has been said, that this being future, could not be intended as a provision for her. But is not a future interest an interest still, though not so good as an interest in possession? It is and may be a consideration of marriage. It does not indeed absolutely vest, because the contingency may never arise; but it is carrying it too far to say that it does not vest at all. Why may it not vest in such a manner as to be transmissible? There is no doubt but after twenty-one she might have released it, though not have assigned it at law, because but a mere possibility in the eye of the law. A condition may descend upon the heir, although no estate does actually descend from the ancestor; and when the condition is performed, he shall be in by descent, because of the condition descending. And as this might have been released, I do not see why it should not be transmissible to the representatives. But if I had any doubt about that, the several authorities that have been cited for the plaintiff would bind me; and particularly 2 Vent. 347 (where the interest was as

<sup>1</sup> Anon. 2 Vent. 347; *Pinbury v. Elkin*, 1 P. W. 563; *King v. Withers*, Cas. temp. Talb. 117; *Barnes v. Allen*, 1 Br. C. C. 181.



contingent as it is here), is an express authority that a contingent interest is transmissible to the representative. The case of *Bulkley v. Stanlake* is the same. It has been said indeed, that in this case the contingency was annexed, not to the legacy itself, but to the fund only out of which it was to arise; but I apprehend the contingency went to the whole. Nor can I help considering that case as another authority that a contingent interest is transmissible to the representative. That of *Pinbury v. Elkin* was a devise of 80*l.* to his brother, if his wife should die without issue by the testator then living; the devisee died in the lifetime of the wife; then the contingency happened, and the legacy agreed to be paid to the representative. The case of *Smell v. Dee*, 2 Salk. 415, weighs but little with me; for, first, I do not think it well reported; secondly, the reason seems idle; for why may not an uncertainty be transmissible as well as a certainty, though perhaps not so beneficial? This, although to be raised out of land, cannot receive a different construction from the other cases; for though it is to be raised out of land, it remains money still; and can any one say, that the contingency upon which this was left to her has not happened? Has not she married? And although she has not lived to receive it, yet the contingency having happened it must go to her husband, who is her representative, and who may well be thought to have married her in contemplation of this additional fortune of 3500*l.*, though depending upon a contingency.

A. devised 300*l.* to Elizabeth Panton, to be paid at twenty-one or marriage, but if she died before, then to the younger children of her nephew Francis Ellison equally to be divided to and among them, the eldest son being excluded from any part thereof.<sup>1</sup> Some of the younger children were born before, some after the making of the will, and some after the death of the testatrix. Elizabeth Panton died under twenty-one and unmarried. It does not appear whether any of the younger children living at the death of A. died before Elizabeth Panton or not. The question was, whether children born after the death of A. but before the death of Elizabeth Panton could take. The judgment of Lord Hardwicke is so replete with general principles that we will transcribe it. "No

<sup>1</sup> *Ellison v. Airey*, 1 Ves. sen. 111.

certain rule can be laid down in cases of this kind; they must be various, as very few words will vary the evidence of the testator's intention, and consequently the meaning of the will; but there are general principles, which are these. The Court generally takes it, that there ought to be a legatee in being, and therefore will not construe a will to extend to persons not in being, unless the testator shows his intention to be such by words in the will, which is the rule at common law as to contingent devises and remainders, for they never construe them contingent or executory unless compelled; nor will they adjudge lands to go to an infant in *ventre sa mere*, unless appearing to be so intended from the words of the will, always avoiding it unless there be a clear intention to the contrary, and this is to avoid suspending, which always tends to make property uncertain, and to the inconvenience of making more divisions than the testator meant. Therefore when there is a devise to children, if it was to be suspended till the death of the father, it might be little beneficial to any of them; and where they are made tenants in common, and consequently no survivorship between them, the Court would avoid its going over, upon the death of any of the children, to the father, for whom the bounty was not intended. And although this cannot be avoided in some cases, yet the extending it further, by allowing it to go to children after born, would make it more probable that the father might take, as representing some of his children. These are the general reasons which the Court has gone upon; and I do not know, but several of the resolutions on this head might be contrary to the real intention of the testator, and that for the sake of convenience. There is a great difference between such devises as this and provisions by marriage settlement; for as before marriage there are no children to whom it can be applied, it must mean all, and there is no place to draw the line in, nor any reason why it should be for one more than another; it is a parental provision made as a debt of nature, and therefore all are entitled. These are the general rules, but this is a middle case, depending on the particular penning of the bequest. It is said, the word *younger* must be restrained to the time of making the will; others say, to the death of the testatrix; others to the death of Elizabeth under age and before marriage; and others

that it should go to all younger children. To confine it to the time of making, it is said that she had taken notice of and given by name to the children then in *esse*, and who are therefore to be considered as the objects of her bounty; but I think it rather holds the contrary way, for where she intends their particular benefit she names them, when not, she uses the general words *younger children*. As to her intending it to all the younger children, there may be a case of that kind, but it would be liable to all the inconveniences which the Court has endeavoured to avoid. I am of opinion that it means such as should be younger children at the death of *Elizabeth* before twenty-one or marriage: it is a contingent legacy, and there is no reason to confine it to the time of making the will or the death of the testatrix, for neither was the time upon which the legacy was to vest; and therefore as the whole is suspended till the death of *Elizabeth*, there is no inconvenience to wait till then. When is this legacy given? At the death of *Elizabeth* before twenty-one or marriage. What is to be done with it? To be divided equally. When? That is not specified; but the natural way of thinking is, that she intended it should be divided when it vests; and there is a stronger reason to think she meant so, for she directed where the interest should go during the life of *Elizabeth*, but after her death before twenty-one or marriage there is no direction about the interest, which is evidence that she intended it to be actually divided at that time, and if it be divided it must be vested. This construction answers the words of the will and the intention, avoids all inconveniences, fixes a proper period, and answers what negatively appears to be the intention of the testatrix, by her not applying the interest after that period, and also finds out who is the eldest, namely, such as should be so at the death of *Elizabeth* before twenty-one or marriage." The Court declared,<sup>1</sup> "That by the death of *Elizabeth Panton* before she attained the age of twenty-one years or was married, the said legacy vested in, and belonged to the three children of F. who were living at the death of the said *Elizabeth*, to be equally divided between them; and the Master was to compute interest thereon from the time of the said *Elizabeth Panton's* death."

<sup>1</sup> *Belt's Supplement*, p. 75.

This case is generally cited merely as an authority that in case of an executory bequest to children, a child born before the time when the possession is vacant shall take ; but it may be doubted whether it was not also Lord Hardwicke's opinion that a child or children dying before that time should be excluded. But however this may be, the question is now settled otherwise, as will appear by the cases we are about to cite.

In *Barnes v. Allen*, Lord Thurlow observed, contingent or executory interests may be as completely vested as if they were in possession. In the case in *Ventris*, the contingency was only as to the *possession* ; but then the interest was so vested that it might be transmitted.<sup>1</sup> In *Devisme v. Mello*,<sup>2</sup> testator gave 4,000*l.* to his brother Lewis, to buy stock, to enjoy the income during life, and in case he did not marry and leave children, "to revert to his brother William's children in equal parts." Lewis died a bachelor, and William had four children living at the decease of the testator, but one died in the life time of Lewis, and Lord Thurlow decided that the representative of the deceased child was entitled to his share.

In *Lady Lincoln v. Pelham*,<sup>3</sup> the testatrix bequeathed one fourth part of certain monies to each of her daughters Frances Pelham and Mary Pelham, with limitations over to their children respectively, and with cross limitations if either should leave no issue ; and if both should die without leaving any children or child who should attain the age of twenty-one or marry, then over to the younger children of the testatrix's other daughters, the Duchess of Newcastle and Lady Sondes. Frances Pelham and Mary Pelham both died without issue. There was one younger child of the Duchess of Newcastle, but he died in the lifetime of Frances and Mary Pelham. Lady Sondes had three younger children, who all survived both Frances and Mary Pelham. Lord Eldon decided that the administrator of the younger child of the Duchess of Newcastle was entitled to one-fourth part of the fund, observing that the gift to the younger children was vested, the contingency being of a species that did not prevent the vesting, but

<sup>1</sup> 1 Bro. C. C. 182.

<sup>2</sup> Ibid. 537.

<sup>3</sup> 10 Ves. 166.

might render the interest in events not beneficial in enjoyment. With reference, he observed, to *Barnes v. Allen* and other cases, those are transmissible interests, capable of being divested, which would be the subject of sale and transmission of every kind. The intention was not that if those younger children should happen to leave children, they should not transmit to their children; when the effect would be to give the absolute interest to Frances and Mary, to whom the residue was given by the will.

It will have been observed that the principle or ground of the foregoing cases is convenience;—that contingency and suspense should be avoided, the Court of Chancery eschewing that, as much as nature does a vacuum: and, again, but certainly subject to the doctrine of convenience, that the probable intention of the testator should be effected.

A testator bequeathed the residue of his personal estate to his wife for life, and at her death amongst her brothers and sister. But in case of the decease of either or any of his brothers or sister-in-law in the life-time of his said wife, then the part or shares of his said brothers or sister so dying should go to and be divided among his, her, or their children. The wife and eight brothers and one sister survived the testator.

One brother died in the lifetime of the widow, a bachelor, but having made his will. On the death of the widow his executors were entitled to one-ninth part of the residuary estate, for it is clear the reversionary estate was vested in the brothers and sister in equal shares, subject only in case of any of them dying in the lifetime of the widow to the bequest in favour of the children.<sup>1</sup>

The sister died, leaving four children, but one of them died before the widow intestate; it is also clear, that the next of kin of the child so dying became entitled to his share, for upon the death of the parent, it was simply the case of a bequest to one for life with remainder to the children of B.,

<sup>1</sup> *Hatch v. Mills*, 1 Eden, 342; *Harvey v. M'Laughlin*, 1 Price, 264; and *Smithe v. Willock*, 9 Ves. 233. And see *Hulme v. Hulme*, 9 Sim. 644; *Ring v. Hardwick*, 2 Beav. 352.

which clearly would give vested transmissible interests to all the children born before the death of the tenant for life.<sup>1</sup>

Another brother died before the widow, having had eight children, all living at the decease of the testator; but two died in his (the brother's) lifetime. One under age, unmarried and intestate, and the other a feme covert leaving her husband and issue surviving. This raised the question, whether under the above devise any transmissible interest vested in the children during the lifetime of their respective parents.

We do not find that this precise point was ever decided, but we shall probably arrive at a tolerably safe conclusion by referring to the general principles stated and illustrated above. We think convenience, and the probable intention of the testator, will both bring us to the result that only children living at the decease of the parent were intended to take. It is true, this is to admit that the children during the lifetime of the parent had contingent interests which might be released, or assigned in equity, but yet which were not transmissible. But assume that the interests of the children became on the death of the testator transmissible, to whom did the share of the child who died unmarried and intestate belong on the death of the widow? Could the executors of the parent claim that which he could never by any possibility have possessed? We think not; no definition of assets reaches such an interest. If not, to whom would the share belong? not to the other children by survivorship, for they take as tenants in common; not to them as next of kin, for the interest of next of kin must vest if at all upon the death of the intestate, and then they had no claim. Such share, then, must be held to have lapsed contrary to the plain intention of the testator, who certainly meant that either the parent or his children should take the whole. Such is the inconvenience which might arise. Again, it may be said that the children were to take not under an independent bequest but as representing their father, and

<sup>1</sup> *Stanley v. Wyse*, 1 Cox, 432. We have looked at this case in the Register's Book, but the dates of the deaths of Elizabeth's three children who died before Sarah are not stated; nor is it positively stated that all Elizabeth's five children survived her; but from the language generally of the order, it must, we think, be so considered; and that the three who died, died between the deaths of Elizabeth and Sarah.

consequently that their title could not accrue till his death ; just as nothing vests in an heir in case of his death before the ancestor. It cannot be denied but that some hardship attends the construction we advocate, and it is probable if the testator had been asked, if a brother dies leaving children, and the issue of a deceased child, are not such issue to take their parents' share? the answer would have been yes. But this mode of trying the question is not conclusive, and it only shows there is some inconvenience : besides, if the deceased child were a feme covert her husband and not her children would take the share ; so that if it were the intention of the testator to include grandchildren he should have made a different will ; and *quod voluit non dixit* decides the question.

Suppose in the case lastly mentioned one of the brothers of the wife had died in the lifetime of the testator leaving children who survived the testator ; in such case, we apprehend, the children would have taken the brother's share equally, and the same would have vested in them on the decease of the testator indefeasibly.<sup>1</sup> And this point has been just so decided by Lord Langdale, M. R., in *Bebb v. Beckwith*,<sup>2</sup> where the bequest was to the children of testator's late uncle, to be divided equally amongst them, and the issue of such of them as should be deceased, such issue to be entitled to the share of his, her, or their deceased parents ; and his lordship observed, " I consider the direction to be, in effect, to hold the fund in trust for division amongst the children then living, and the issue of such of them as may be then dead ; and the testator, having used the words ' share and share alike,' follows them up with a direction, that the issue of a child were to take amongst them only a child's share, the effect of which, I think, is to limit the amount of the share to which the issue are entitled, but not to make the gift to issue a gift which could only take effect by way of substitution for the gift to a child living at the date of the will."

<sup>1</sup> See Judgment of Alexander, C. B., in *Bone v. Cook*, M'Clel. 177.

<sup>2</sup> 2 Beav. Cases in Chan. 308.



# ART. V.—MODERN COMMON LAW REPORTS OF DECIDED CASES.

“ I acknowledge the utility of publishing the solemn decisions of the Courts ; but I say again, let the reports of those decisions be faithfully given, and stamped with authority ; and let the grounds of such decisions be rational and apparent. Let not the laws of England be picked out, like diamonds from a dunghill, from among such crude and incoherent, such unintelligible and contradictory matter as now loads our shelves. Let us seriously consider the evils which must arise from suffering absurdity to be consecrated by use ; and when established as a precedent, to interfere with, and perhaps to render nugatory, the undoubted principles of our laws.”—*Introduction to Watkins on Conveyancing*, p. 64.

WHEN we reflect that “ the decisions of Courts of Justice are the evidence of what is common law,” and that these decisions can only be made generally known to the public through the medium of Reports, it is clear that the duty of a reporter is one of no common responsibility. The cases he publishes go forth to the world as illustrating and establishing the law of the land, and it is no consolation to a suitor, who has relied upon a report as an authentic statement of a real decision, to be told mildly by the judge, while he condemns him in costs, that the question has been misunderstood by the reporter, and that the case is not law.

Accuracy therefore is the first duty of a reporter, but it is by no means the only one. Clearness is necessary, or his volumes will merely confuse ; brevity is essential, or they will fatigue ; sound discretion is also most requisite, both in selecting those cases alone where questions of real doubt or difficulty are solved, and in rejecting all decisions in which it is universally admitted that the judge, as sometimes *may* happen, has mistaken the law. The shortest possible time should elapse between the delivery of the judgment and the publication of the report, in order that the existing state of fluctuating law may at all times be known ; and the work should be sold at the lowest remunerating price, so as to secure the most extensive sale.

These observations are so trite, and the truths they inculcate so apparent, that we should feel ashamed of having made them, if modern reporters did not seem in a great measure to have forgotten or undervalued their importance. In the hope of effecting some improvement where there is so much scope for it, we have been induced to print the present article ; and

if we can cause, by our strictures, any the slightest amendment to be made in the present mode of reporting, we shall feel that our time and our labour have been most profitably bestowed. Perhaps we shall best perform the task we have undertaken by briefly noticing in order the leading Common Law Reports.

Those of Messrs. Adolphus and Ellis in the Court of Queen's Bench, occupy the first place in professional estimation, but we pay a high price for the superior care and accuracy which distinguishes them. At the time we are writing (April 9, 1842) they are no less than *one year and nine months* in arrear, the last case published in the last number having been decided on the 24th of June, 1840. We are well aware that under the late statute of 1 & 2 Vict. c. 32, the court now sit in bank for some days during the vacations, and consequently a greater number of cases are decided; but if the reporters, with their present force, are unable to meet the increased demands on their exertions, it is high time for them to engage some permanent coadjutor. Still the very delay we have been censuring might be made productive of one advantage, if the reporters would be contented with only a brief notice of all those cases, which, in the interval between decision and publication, have either been affirmed or reversed in a Court of Error, or overruled in a Court of Law, or expressly rendered nugatory by the passing of some statute. Indeed this course appears so natural, that it is with much surprise we find that it has not been adopted by Messrs. Adolphus and Ellis.

To illustrate our meaning, we would refer to the case of *Haigh v. Brooks*, and *Brooks v. Haigh* in error, reported consecutively in 10 Adol. & Ell. 309, and occupying twenty-five pages. In that case two points were decided, the one respecting the validity of a guarantee, the other relating to the sufficiency of a consideration for a promise. The Court of Exchequer Chamber affirmed on both points the judgment of the Court of Queen's Bench; and the reporters have given at length, and as we humbly conceive unnecessarily, the arguments in both courts, though the same counsel were engaged on both occasions, and though upon most of the cases cited before the judges below ample comments were made in the

argument addressed to the Court of Error; thus, seven pages are filled with the first argument, and ten and a half with the second, while the last judgment is contained in something less than half a page. So the case of *Plevin v. Prince*, 10 Adol. and Ell. 494—499—where a question arose respecting the fees allowed to sheriffs, and the effect of the statute 23 Hen. 6, c. 9, (not c. 10, which by mistake is mentioned in the report)—might with prudence have been reported in the shortest possible form, since the statute of 7 Will. 4 & 1 Vict. c. 55, by repealing so much of the act of Hen. 6, as related to sheriffs, by establishing a new scale of fees, and by providing a summary mode of proceeding where sheriffs or other officers demand larger emoluments than are allowed, has rendered the judgment pronounced in that case of little importance.

Again, it was scarcely necessary to report at length the case of the *Queen v. James*, to be found in the same volume p. 423, where it was held that the notice of an application for an order in bastardy need not be signed by a guardian of the union of which the parish applying formed part, when a note appended to the very case points to the late statute of 2 & 3 Vict. c. 85, which transfers all questions of bastardy in the first instance from the quarter to the petty sessions, and expressly directs that the proceedings shall be instituted by the guardians, the overseers having power to interfere only in cases where no guardians are appointed. One more instance, where many might be found, will suffice for our present purpose. In *Reg. v. Exminster*, 12 Adol. & Ell. 2, the question before the Court had reference to the rateability of corporate property. The case is reported in eleven pages, the decision occupying the same number of lines; and this decision is no longer the law, since the legislature has expressly overruled it by a statute to which reference is made in a note to the case.

We have said that brevity is an essential ingredient in able Reports: we wish these learned gentlemen entertained the same views, or at least acted as if such were the case. They might then possibly agree with us in thinking that thirty-eight pages are a little too many to bestow upon the case of *Reg. v. Humphery*, 10 Adol. & Ell. 335, where the point discussed was whether a statute, which enacted that an oath was to be

taken by a candidate "*upon his admission*" to an office, meant that the party must be sworn, *before or at the time of* or within a reasonable time *after* his admission. In *Wilson v. Hoare*, in the same volume p. 236—247, the case turned upon what fine was due to the lord in respect of the admission, to a copyhold estate within the manor, of fourteen persons who were joint trustees of a charity; and we cannot help thinking that it would have been sufficient in this instance to have published the judgment alone, in which the circumstances are fully detailed; the more so as the case had been already reported at length in 2 B. & Ad. 350, and the arguments of counsel throw but little fresh light upon the subject. The note of the proceedings in the Exchequer Chamber might also, we imagine, have been omitted without much injury to the report, since, as Lord Denman observed, and as was clearly the fact, the subject there "*underwent but little discussion.*"

So in *Newman v. Bendyshe*, 10 Adol. & Ell. 11, where the validity of a conviction was the question to be decided, the reporters have set out the conviction together with the clauses of the act under which it took place. The counsel for the convicting magistrates, in moving for a rule nisi to enter a nonsuit, undertakes to answer in his argument *seven* objections which had been taken to the conviction at the trial. The judgment is thus given: "The conviction is bad on the ground relied upon in the seventh objection; viz., that it charged the plaintiff with more than one offence against the statute, for which he might have been distinctly convicted." Would it not have been abundantly enough to have selected such parts only of the conviction, the act, and the argument, as related to the seventh objection? Again, the case of *Parnaby v. Lancaster Canal Company*, 11 Adol. & Ell. 223—244, might, if the declaration were omitted, occupy six pages less than it does at present, and yet the value of the report would not be materially diminished, since the declaration in itself is not particularly well drawn, and is so special as to be useless as a precedent, and since all the prominent allegations are noticed in the very luminous judgment of Tindal, C. J. in error, p. 241, where their defects are also distinctly pointed out.

This unnecessary prolixity, of which the instances given

above will serve as samples, pervades in no common degree these otherwise valuable Reports, and is the more especially wearisome, when the Court are laboriously engaged, as too often happens, in putting a construction upon some private act of Parliament, or in extracting sense from lengthened affidavits, from confused demurrable pleadings, or from complex statements of facts. In these and the like cases, which, in the language of the newspapers, are for the most part "important only to the parties immediately interested," and in which it scarcely ever happens that any doubtful principle of law is established, or any tangled doctrine unravelled, surely it would be amply sufficient to state the facts succinctly, and to give the judgments at length. We are certain that, as a general rule, it cannot be necessary that such cases should occupy from ten to twenty pages apiece.

We know that in urging the necessity of curtailing the length of Reports, we are doing anything but diminishing the labour of the reporters; for it is infinitely easier in most cases to write a page of facts or of argument, than by reflection to ascertain the utility of what is written; but the annoyance to the reader is excessive; for without considering the increased expense of the Reports, which the needless consumption of so much paper must of necessity cause, the consumption of time which takes place in separating the wheat from the tares, or in reaping them both together, is of real importance to the practitioner. Reporters should remember that there are only 365 days in one year, and that five thousand pages of octavo letter press can scarcely be read and digested in that period by any gentleman whose time is at all occupied by active pursuits; yet this is the very lowest computation at which the private reading of any practising barrister can be estimated, who pretends in the present day to make himself master of the Common Law Reports. To borrow the quaint yet strong language of the Rev. Sydney Smith, the reporter "should think upon Noah and be brief. The ark should constantly remind him of the little time there is left for reading; and he should learn, as they did in the ark, to crowd a great deal of matter into a very little compass."

Messrs. Gale and Davison also report in the Court of Queen's Bench, and deserve much credit for the activity they display

in keeping down all arrears. The last case they have published bears date the 22d November, 1841, thus showing that they are nearly a year and a half in advance of Messrs. Adolphus and Ellis. These Reports are in general neatly drawn and correct, but the pruning knife might here also at times be used with considerable advantage. Thus in *Panton v. Williams*, in error, reported in their last number, p. 505, the simple point discussed was whether probable cause was a question for the judge or jury; and such being the nature of the case, it is clear that a long statement of facts which now occupies five pages, together with so much of the bill of exceptions as related to the inference to be drawn from these facts, might with advantage have been omitted. The arguments upon them are left out, and they are in no way noticed in the judgment. Again, in *Robinson v. Reynolds*, in error (1 G. & D. 526), Mr. Davison publishes a long plea of five pages which had already been set out verbatim in 3 Per. & Dav. 611, where the judgment delivered in the Court of Queen's Bench is reported. He omits the argument indeed, as "not differing in any material respect from the one urged in the Court below." Why not also omit the pleading? Many examples of a similar nature might be given, but these will suffice.

Turning our attention from the Queen's Bench to the Common Pleas, we find that the observations we have been making respecting prolixity and delay apply, if not with equal, at least with considerable force to the reports of Mr. Serjeant Manning and Mr. Granger. The last case reported by these gentlemen was decided more than *fourteen* months back; and *forty* pages bestowed on the case of *Bruce v. Wait*, vol. 1, p. 1, where a proceeding by foreign attachment was brought on error before the Court by a garnishee in a suit in a Tolzey Court, or *fifty-four* pages, occupied in discussing the validity of a claim for compound interest, will serve to acquit the reporter of the "*brevis esse laboro*;" though a perusal of these cases, with the notes, may lead some persons to imagine that he is still open to the charge of "*obscurus fio*." See *Attwood v. Taylor*, vol. 1, p. 279. Still we must do these gentlemen the justice to say that their reports are more correct than those of their able predecessor, Mr. Bing-

ham ; and whatever other faults they may betray, they certainly show no signs of negligence or inaccuracy. Indeed, our objection to them consists in their being too elaborately prepared. The multitude of notes which arrest our progress in almost every case, and the profusion of antiquarian learning they display, confuse our feeble understandings ; and though they mark the inexhaustible memory and research of the learned author, yet in a book of modern reports they are of little practical use. From works of this kind the reader hopes to discover what the law *is*, and cares very little for being told what it *was* in times immemorial. Historical inquiries into the nature of replegiari writs and plaints in replevin, (see *Thompson v. Farden*, vol. 1, p. 541 note (a), 546 note (b), and 548 note (b)), or respecting the ancient office of attorney-general (see *Paddock v. Forrester*, id. 587 note (b), 588, note (b)), appear to him out of place and uninteresting. If he is a plodding student, whom a paramount sense of duty compels to read straight on, he quietly goes to sleep in endeavouring to master their meaning. The practical man yawns or pishes in passing them over, while the satirist, in glancing at their contents, is caught unconsciously quoting the words of the old play, "Printed books he contemns, as a novelty of this latter age ; but a manuscript he pours on everlastingly, especially if the cover be all moth-eaten, and the dust make a parenthesis between every syllable."

Again, in the note appended to *Wynne v. Wynne*, vol. 2, p. 19, we think that the reporters might have safely given their readers credit for ordinary knowledge, and might have omitted the following formidable passage :

"That any interest in land of uncertain duration (though not expressed to be for life), determinable by matter subsequent, which (per *Brooke J. M.* 14 H. 8, fo. 13 a) is the subject of human agency (as where it is determinable at the will of a stranger), constitutes a freehold for life, see *Bracton*, lib. iv. tract i. c. 28, fo. 207 a ; 3 Ass. fo. 5, pl. 9 ; *Vavisor's Case*, 11 Ass. fo. 29, pl. 8 ; *Burton v. Burton*, 17 Ass. fo. 49, pl. 7 ; *Abraham v. Brokesby*, P. 19, H. 6, fo. 67, pl. 14 ; T. 35 H. 6, fo. 63, pl. 3 ; T. 37 H. 6, fo. 26, pl. 1 ; M. 7 E. 4, fo. 16, pl. 10 ; M. 20 E. 4, fo. 9, pl. 4 ; M. 21 H. 7, fo. 38, pl. 47 ; M. 14 H. 8, fo. 13, 14 ; *Littleton*, s. 250, 381 ; *Co. Litt.* 42 a, 56 a, 214 b, 218 a ; 4 *Co. Rep.* 30 ; *Dyer*, 300 b ; *Allen v. Hill*, *Cro. Eliz.* 238 ; *Cordell's Case*, *Ibid.* 315 ; 8 *Co. Rep.* 96 a ;



*Paget v. Dr. Vossius*, 1 Ventr. 325 ; 2 Lev. 191 ; *T. Jones*, 72 ; 2 Mod. 223 ; 3 Keble, 779 ; *Blamford v. Blamford*, 3 Bulstr. 100 ; *Cadee and Oliver's Case*, 3 Leon. 157 ; *Havergall v. Hare*, Poph. 126, 127 ; Cro. Jac. 510 ; *Shepp. Touchst.* 270 ; *Brewer v. Hill*, Anstr. 114 ; *Hewlins v. Shippam*, 5 B. & C. 229 ; Bro. Abr. Lease, pl. 67 ; Com. Dig. Estate (E. 1) ; Bac. Abr. Estate for Life, (A.) ; 10 Vin. Abr. 288, 289, 294, 295 ; 2 Bla. Comm. 121 ; 2 Hayes, Introd. 38, n ; *Preston, Est.* 405.

This is "a cloud of witnesses," with a vengeance, to prove that which we believe has never been disputed, and might not be inaptly compared to the discharge of a park of artillery for the purpose of killing a fly.

Still the public would entertain a very erroneous impression respecting the annotations contained in these reports, should they assume that all are like those to which we here referred. Many contain very sensible remarks, and not a few are highly useful in collecting and arranging the latest cases on the respective subjects ; and although we may smile at a grave note gravely defining the word "gaol" for our benefit (see *Edgell v. Francis*, 1 M. & G. 223, note (a)), or frown at a classical charge of perjury against a special jury, which, if intended for wit, is a complete failure, and if meant for earnest, is what we would rather have named by the author than by ourselves (see *Cave v. Mountain*, vol. 1, p. 260, note (a)), still we readily admit that the profession are much indebted to those gentlemen for their industry and zeal ; and if the labour and ability now bestowed on the abstruse and antiquarian notes could only be applied to the task of condensing the text, and bringing up the arrears, these reports would deservedly stand high in public estimation.

Mr. Scott, who also reports in the Court of Common Pleas, is a formidable rival to the gentlemen whose work we have just discussed ; and his reports enjoy a somewhat extensive circulation among such members of the profession as dislike the interruption of frequent and long notes. — We cannot, however, praise these Reports very highly, as they are more than a year in arrear, and many of the cases drag their slow length along in the most tedious manner. As an example, we would refer to the case of the *Grand Junction Railway Co. v. Freeman*, vol. 2, N. S. p. 705, which occupies

forty-eight pages, and might with great propriety have been reported in less than half that space. The case turned upon the construction of a railway act, and came before the Court of Exchequer Chamber upon exceptions taken at the trial. The mere statement of facts fills fifteen pages, when the luminous summary contained in Lord Denman's judgment occupies only two, and amply explains all the points decided. The arguments might also with advantage have been largely curtailed. Similar observations apply to the case of *Young v. Turing*, id. 752, where the reporter has bestowed six pages on an ordinary declaration on a policy of insurance, and on the evidence adduced at the trial, though all the facts are succinctly stated in a single page in the judgment pronounced by Lord Abinger. Again, the case of *Parkinson v. Whitehead*, id. 620, is reported in eleven pages. The declaration, pleas, and replications, are set out with sundry special demurrers. These last are argued at length, but not so much as a hint is thrown out which could in any way mark the opinion of the Court. At last, an objection is raised, that the declaration is bad; a short observation by Tindal, C. J., implies that he thinks it is so, when the plaintiff's counsel, "finding," as the reporter tells us, "that the impression of the Court was decidedly against him upon this point," applies for leave to amend. This is the whole report! why it was published in its present form we cannot imagine. So the case of *Turner v. Diaper*, id. 447, might surely have been omitted, as the only point there decided was that in an action of debt for work and labour, the plaintiff could not recover for work agreed to be done, but only for such as was really done by himself. In fairness, however, to Mr. Scott, we must observe that the case of *Bruce v. Wait*, which we have mentioned above as reported at unnecessary length by Mr. Serjeant Manning and Mr. Granger, occupies in his work less than half the space it fills in the other Reports, and we noticed with real pleasure that in *Attwood v. Taylor*, Mr. Serjeant Wilde's vehement attack upon the Lord Chief Baron is dismissed and softened in ten or twelve lines, while his opponents have, with very dubious taste, wasted six pages by introducing it at length; compare 1 Scott, p. 633, with 1 M. & Gr. 306—313.

In the Court of Exchequer Messrs. Meeson and Welsby

are the sole reporters, and these gentlemen perhaps publish the most truly valuable of all the common law reports. This superiority must be ascribed, partly to the extraordinary talent of the barons who compose that Court, partly to the absence of those heavy crown cases which weigh down the volumes of Messrs. Adolphus and Ellis, and partly to the ability and agreeable style of the reporters themselves; but having said thus much in their favour, we shall be excused, if not thanked, for pointing out what appear to us the few blemishes of the work. In the first place, the references are not unfrequently inaccurate, especially in the figures; and this is a defect, which, entailing great inconvenience upon the practitioner, might with ease be corrected by a little more attention. The marginal notes too, are in many instances causelessly long. Take for example the note of *Doe d. Roy-lance v. Lightfoot*, vol. 8, p. 553.

“ Under a devise of all the testator’s real and personal estate, ‘after payment of his just debts and funeral expenses,’ lands mortgaged in fee to the testator do not pass.

“ By deeds of lease and release, dated 7th and 8th September, 1819, lands were mortgaged in fee, subject to a proviso, that if the mortgagor should well and truly pay the principal money and interest on the 25th day of March then next, the mortgagee, his heirs and assigns, should and would reconvey and reassure the mortgaged premises to the mortgagor, his heirs and assigns. There was also a covenant that it should be lawful for the mortgagee, his heirs and assigns, from time to time and at all times after default should be made in the payment of the principal money and interest, contrary to the proviso aforesaid, peaceably and quietly to enter into, have, hold, occupy, possess, and enjoy the said premises: and also a covenant by the mortgagor for further assurance in case of such default:—Held, that the mortgagee had the right of possession, under this deed, from the time of its execution, and not merely from the 25th March, 1820: and therefore, that an ejectment for the recovery of the premises, brought by the heir-at-law of the mortgagee, within twenty years of the latter but not of the former date, (no interest having been paid in the meantime,) was too late.”

This with a very little difficulty might be thus shortened:—

“ Lands mortgaged in fee to A. do not pass under a devise by him of ‘all his real and personal estate after payment of his debts.’

“ By deed dated 8th Sept. lands were mortgaged in fee—pro-

viso, if mortgagor should pay principal and interest on 25th March next, mortgagee should reconvey premises to him. Covenant by mortgagor that in default of such payment mortgagee might quietly enter into, possess, and enjoy the said premises. Also covenant for further assurance on like default :—Held, that mortgagee had the right of possession, under this deed, from the time of its execution, and not merely from 25th March.”

We would further remark that some few cases, in which the law is quite clear, might well have been omitted ; for it does not follow that every argument deserves to be reported which Ignorance ventures to urge, or with which Speculation, in the vain hope that the Court like Homer may be found slumbering, determines to tempt the favour of fortune. Thus the case of *Pitt v. Purssord*, vol. 8, p. 538, was scarcely requisite, in order to acquaint the profession that “ the payment of a joint and several note, *when due*, though without demand or action brought, was not voluntary, so as to debar the surety paying the amount from suing his co-surety for contribution.” So it may fairly be observed of *In re Coales*, vol. 7, p. 390—396, that it only fills up a place, which might be better supplied by more important matter ;—for who doubts the law, that where a party dies domiciled in England, his foreign assets are subject to legacy duty here ?

The principal defect in this publication consists in the constant interruptions in the argument occasioned by questions and observations of the learned barons. Thus, in the *Grand Junction Railway Co. v. White*, 8 Mees. & Wel. 219, 220, five interruptions occur in the space of one page ; in *Roach v. Wright*, id. 156, 157, three in half a page, and in *Fouldes v. Willoughby*, id. 541, 542, five in the same space ; while in *Williams v. Morris*, id. 492, there are two of considerable length, which closely follow each other, though their substance is repeated in the judgment set out in the very next page. It may be urged in defence of this method of reporting that the interruptions really occur, and therefore to blame the reporters for noticing them, is in fact to blame the practice itself. Now it may be true that in some instances, where the counsel is fully master of his subject *and himself*, hypothetical cases put by the judges as tests of the correctness of the principles urged, may be of service in enabling the Court to arrive at a

sound conclusion, but, on the other hand, a connected chain of reasoning is often thus irremediably broken, and we have more than once observed an unfortunate counsel, who, if not interrupted, might have done justice to his client's cause, so confused by being obliged to answer off-hand a *reductio ad absurdum* question, that we have felt much comfort in reflecting that we had not, like the reporters, to make sense of his argument. Still whatever may be the advantages or disadvantages attending this mode of conducting business in Court, we think it highly inconvenient to adopt a similar plan in reporting. The arguments as reported never are, nor are intended to be, exact representations of the speeches delivered; heaven forbid they should; they merely constitute a brief and connected *resumé* of the points of law urged on either side, and the difficulty of collecting these points from a series of queries answered by other queries, is even greater than that of obtaining a clear knowledge of facts from statements reported in the form of questions and replies. Whoever has endeavoured to extract truth from evidence taken before the House of Commons, and published in this form in the ponderous blue books, will acknowledge that the task is neither agreeable nor satisfactory.

On the subject of Mr. Dowling's Practice Cases it will be unnecessary to say much. If this work were confined to a notice of such cases only as were determined in the Bail Court, in which some doubtful points of practice were explained, and which were heard and noted by the intelligent reporter himself, there would be no drawback whatever on its utility; but when he travels out of his own Court into the Courts of Common Pleas and Exchequer on what we cannot help calling a foraging expedition, and presses into the service of his bookseller not only questions of practice, but questions of pleading and of general law, we think he mistakes both his own interest and that of the profession; for the knowledge which gentlemen of the bar would gladly purchase at the price of a few shillings, becomes a little too dear at an annual expenditure of two guineas and a half. By confining himself to one Court the reporter might personally attend to each case, and judges would no longer observe, as they now *sometimes* do, when a case is cited from Dowling, "*If* I said so and so, I was

wrong," see 10 Ad. & Ell. 18; or, "I am *made* to say this, though it has never been my opinion;" but on the contrary the work would with ease gain authority from the known accuracy of the compiler. The commencement of a new series of these Reports affords a good opportunity for reflecting upon the future plan of publication. We would have Mr. Dowling confine his labours to the Bail Court alone, and we believe that in saying this, we only echo the sentiments of the profession: for although we are aware that among country attornies the work has some circulation, and is thought convenient by those gentlemen, as collecting all the latest information on a subject both interesting and useful to them; yet we think that, with few exceptions, local practitioners would gain sufficient knowledge for all ordinary purposes from the treatises of Messrs. Tidd, Archbold, Lush, and Bagley; and we know no valid reason why the great bulk of the profession should be compelled to purchase in duplicate a vast quantity of matter, in order that a few persons may read the last practice cases decided in the Courts of Common Pleas and Exchequer, who are not satisfied with the text writers, and who yet refuse to buy the regular Reports. If, however, it is absolutely necessary to gratify these gentlemen, a few numbers in the present form might be struck off expressly for them.

Now let us briefly examine the present form of this work. In the first number of the new series (the only one already published) not a single case decided in the Bail Court is inserted, but the first 159 pages are occupied with cases in the Exchequer, and no less than thirty-two of these cases will be found more ably reported in the volumes of Meeson and Welsby. Many cases too are set out at length, which have nothing on earth to do with practice or even pleading—for instance, *Jones v. Gooday*, p. 50, where the question was how to estimate damages in an action of trespass for removing the plaintiff's soil. In *Beeching v. Westbrook*, p. 18, was a point of law respecting the admissibility of an unstamped memorandum of agreement. *Hughes v. Barber*, p. 80, related to a variance between the declaration and agreement. In *Foulds v. Willoughby*, p. 86, was a discussion on the law of trover; and in *Smith v. Royston*, p.

124, the only question before the Court related to what evidence was necessary to support a plea of *liberum tenementum*. Several cases are utterly useless, as either establishing no point of law at all, or confirming principles which require no confirmation. *Roadknight v. Green*, p. 65, is an example of the former class, as in that case no judgment was ever delivered, the point there discussed being subsequently decided in express terms by an act of the legislature. As instances of useless cases we would refer to *Eyre v. Shelley*, p. 83, where the Court refused to order the Master to fill up items of charge which an attorney in his bill of costs had *himself* left *in blank*; and to *Prime v. Giles*, p. 167, where it was held by the Court of Common Pleas that an affidavit in support of a motion for a *distringas* must state the locality of the defendant's house, the same point having been decided by the same Court only a few months before in *Halton v. White*, 2 Man. & G. 295. So in *Doe d. Portland v. Roe*, p. 183, and in *Doe d. Pamphelon v. Roe*, p. 186, points of practice are reported, respecting which no rational lawyer could entertain a doubt; while *Dalton v. M'Intyre* gives us the astonishing intelligence, that the Court will not set aside a demurrer as *frivolous*, when the point raised *fairly* admits of argument.

This constant publication of cases in support of clear law is excessively tiresome, and irresistibly calls to mind the amusing colloquy in "*Much ado about Nothing*."

"*Don Pedro*.—I think this is your daughter.

"*Leonato*.—Her mother hath *many* times told me so.

"*Benedick*.—Were you in doubt, sir, that you asked her so often?"

We may here notice a foolish custom, which has been adopted, we believe, by all modern reporters, namely, the careful publication of every legal promotion. That events of this nature should be briefly mentioned in one of the leading Reports, say, in the work of Messrs. Adolphus and Ellis, is reasonable and proper, but that eight or ten volumes should proclaim the interesting fact that Mr. Justice —— has retired, to the lively regret of every member of the bar, excepting only his immediate successor; or that Fiddlecumb Dull, of the Inner Temple, Esq., on taking the coif, has given a ring



with the appropriate motto "*Repente*," is really ridiculous, and can only serve the consolatory purpose of filling a few pages in each volume with matter, the *law* of which neither ignorance nor malice can ridicule, however jobbery may chuckle or wisdom frown. Similar observations apply to the practice of publishing in platoons the Rules of Court. The profession would be perfectly satisfied if those Rules were confined to the pages of Messrs. Adolphus and Ellis.

Our review of the Common Law Reports in Banc would be incomplete if we did not shortly allude to The Law Journal. This is a publication of magnitude, which comprises reports not only of cases determined in the Superior Common Law Courts, but also those decided in Courts of Equity and Bankruptcy. It likewise contains a copious and careful abstract of the statutes. Its price to the subscribers is 3*l.* 4*s.* per annum, and for the sake of those persons who may wish to compare the cost of this work with that of the regular Reports, we subjoin a list of the prices of the latter during the last year:—Ad. & Ell. 2*l.* 12*s.* 6*d.*; Man. & Gr. 1*l.* 19*s.*; Mee. & Wels. 2*l.* 19*s.*; and Dowl. 2*l.* 11*s.* 6*d.*, making a total of 10*l.* 2*s.* If we add to these the Equity and Bankruptcy Reports and the Statutes at Large, the annual amount will not be less than 20*l.*

The work has one very great advantage—it is seldom more than a single term in arrear, and the cases are in general reported with skill and correctness. Instances of negligence sometimes occur, as in the case of *Reg. v. Inhabitants of Rishworth* vol. 11, N. S., M. C. 34, where the facts and the arguments are clumsily drawn up—one counsel's name is omitted and another misspelt—and Pattleson and Coleridge, Js., are made to speak indifferent English and not very good sense. Compare this case with the report in 1 G. & Dav. 597, which is in every respect superior. So also, *Fox v. Waters*, vol. 9, N. S., Q. B. 329, is not only longer than the same case in 12 Ad. & Ell. 43, but is certainly not so well reported, and a critical civilian would probably be shocked with the marginal note of *Ursule Le Normand v. the Prince of Capua*, vol. 11, N. S., C. P. 58, which speaks of "a foreigner, whose *ordinary* domicile was in France." Still such examples are rare, and

the work is gradually gaining the confidence of a cautious public.

The present reporters of *Nisi Prius* and Criminal Cases are Messrs. Moody and Robinson, and Messrs. Carrington and Marshman. The Reports of the first possess the valuable quality of conciseness, and indeed in every respect are incomparably superior to those of their rivals; still some cases are reported of little practical use, and a few where the law is perhaps mistaken. Thus (to take two or three examples from the last number) it was scarcely necessary to tell a lawyer that if a party *designedly* places on a railway rubbish which is likely to obstruct the carriages, he may be found guilty of *wilfully* obstructing the line, though his object was not expressly to upset the train, *Reg. v. Holroyd*, 2 M. & Rob. 339. Again most persons would acknowledge, without the aid of a precedent, that the owners of a vessel, disabled by the negligence of its crew, are answerable for damage done by its subsequently drifting against another vessel, *Seccombe v. Wood*, id. 290; and probably Lord Hale in his *Pleas of the Crown*, vol. 1, 428, supported by *Rew's case*, Kel. 26, and by common sense, would generally be considered as ample authority for the proposition, that a party who wilfully inflicted a wound which caused death, was guilty of murder, though life might have been saved if the deceased had consented to submit to a surgical operation, see *Reg. v. Holland*, id. 351. Of *Reg. v. Hurse*, id. 360, it is sufficient to say that it is apparently opposed to *Else's case*, 1 R. & R. 142, which was decided unanimously by the judges; and on *Reg. v. Parr*, id. 346, we will only observe that we think *Messingham's case*, 1 Moo. 257, which was also decided by all the the judges, is sounder law. We would suggest that this work might be rendered cheaper and much more convenient if a smaller type were adopted in future, and the cases were printed with a less margin and closer together. There seems no reason why a volume of Reports should be printed with the huge type of a parish Bible.

We would gladly avoid speaking of the Reports of Messrs. Carrington and Marshman if we could do so consistently with our plan, for we find some difficulty in discussing this work with becoming gravity. When we say this work,

we mean to include also the Reports of Messrs. Carrington and Payne, for though the name of the firm is now altered, we fear that business is still conducted on the old plan. These gentlemen are the successors of Lord Campbell, but his mantle has assuredly not fallen upon them. The only similarity that we can trace as existing between their respective works, is the careful insertion at the end of each case of the names of the attorneys; a practice which rightly or wrongly was condemned at its introduction for its supposed unprofessional tendency, and has long been considered as constituting the only blemish of Lord Campbell's most valuable Reports. We once heard of a scholar who imagined that he might emulate the reputation of his eminent tutor, if, like him, he could only be contented with dirty linen.

To give a connected sketch of these Reports would very far exceed our limits; but we shall throw together a few notices of cases, which we shall intersperse with some short quotations and marginal notes, and we hope the public will thus be enabled to form a pretty correct estimate of the value of the entire work.

The first case to which we will refer is *Reg. v. Tollett*, 1 Car. & Mar. 112. Filling, as it does, *eight* pages, it cannot be cited; but we would wish our readers to peruse it with care, and, to observe the form in which it is reported. First, the counsel for the prosecution states what facts he shall prove, the witnesses then state these facts, and lastly the judge, while commenting upon their effect, repeats them again, so that the case not a little resembles a bill in chancery where the story is told thrice over. A full half page of the summing up is filled with matter wholly irrelevant, and a point of law is argued at very unnecessary length by *Carrington* for the prisoner. Perhaps however we should not press heavily on this portion of the report, since we know that it is natural for a counsel, and indeed for every man, to estimate at a very disproportionate value the matters in which he has been himself concerned. To prove that our objections to the absurd length and style of this report are not merely theoretical, but may with ease be attended to in practice, we here subjoin a short form of the very same case; and though by so doing we run the risk of being deemed tedious, we believe that the contrast may

yet be of service ; certainly the best mode of correcting an evil is first to point out the defects, and then to show the way in which they may be remedied.

*Short Form of Reg. v. Tollett.*

**LARCENY.**—The prisoner was charged with stealing some money, some articles of clothing, and two boxes, the property of H. E.

It was proved that the prisoner agreed to elope with the wife of the prosecutor, and for that purpose came to his house at midnight, when the wife gave him the property mentioned in the indictment, which he took away. The wife would have followed him, but the prosecutor discovering the scheme prevented her. The boxes containing the money and clothes were, when found with the prisoner, still locked, the wife having retained the keys. No act of adultery was proved.

A. intending to elope with B.'s wife, took jointly with her the husband's property.—Held larceny, though no elopement followed, and no adultery was proved.—Semble, the same, though the goods taken had been the clothes of the wife.

**CARRINGTON**, for the prisoner, admitted *Rex v. Tolfree*, 1 Moo. C. C. 243, to be law, where the judges held that an adulterer was guilty of larceny, who had carried off some of the husband's goods at the same time that he had eloped with the wife ; but he distinguished the present case from this, as the wife had not eloped, and no act of adultery was proved. He also urged that bulk had not been broken, and that the prisoner did not know the contents of the boxes.

**COLERIDGE, J.**—I think, as far as this case is concerned, there is no valid distinction between actual adultery and an intention to commit that crime ; for in either event, the goods were clearly taken *invito domino*. As to the other point, even should we assume that the prisoner was ignorant of what the boxes contained, he still knew they contained something which did not belong to him, and the larceny would have been the same though the boxes had been filled merely with the wife's clothes, for her clothes are her husband's property.

The prisoner was convicted.

Then in *Atkins v. Curwood*, 7 C. & P. 759, we are taught by Lord Abinger the humiliating lesson that “a barrister's wife is no more than any other man's wife.” *Clements v. Williams*, vol. 8, 58, tells us what we shall scarcely be deemed arrogant for saying that we knew before, namely, that a schoolmaster cannot charge for clothes supplied to a scholar without the sanction, express or implied, of the boy's parent or

guardian. The marginal note of *Hall v. Benson*, vol. 7, 711, decides that "where two brokers are referred to in advertisements by a ship-owner, and one procures the cargo and receives the freight, and the other pays the charges for clearing out the ship, &c. the latter must share the commission, &c. with the former, and cannot, by the usage of trade maintain an action against the shipowner." On referring to the case, which occupies seven pages, it appears to be a valuable authority, as the *jury* pronounced the decision. The opinion of the *judge* is given in the following colloquial style:—

"*Tindal*, C. J.—'I cannot say that it must not go to the jury.'

"*Erle*.—'Then were not the parties joint brokers?'

"*Tindal*, C. J.—'That is a question for the jury; that will be whether, in this transaction, they were in the situation of partners.'

"*Erle*.—'I will not cite cases at *Nisi Prius*.'

"*Tindal*, C. J.—'No. If it becomes necessary, you shall have the benefit of an application to the Court.'

"*Erle*.—'If the Court, upon these facts, think there was a partnership, I shall have the benefit of it?'

"*Tindal*, C. J., assented. *Erle* then addressed the jury."

The same case informs us, as the only remaining point of law, that "usage of trade is a general and prevailing course of business, and witnesses who are called to prove it, should cause their minds to revolve over instances known to them of its having been acted on." *Lacy v. Osbaldiston*, vol. 8, 80—87, is a very interesting case, for we learn not only that the proprietor of a theatre may lawfully dismiss the acting manager if he misconducts himself, but also "that such manager cannot under the words 'usual privileges of his situation' claim as matter of *right* the use of a private box, and the power of giving admission orders, though both are usually allowed as a matter of *courtesy*." We may soon expect to see reported a case which shall decide that a man-cook under the word "perquisite" cannot claim as of right a saddle of mutton. This distinction between courtesy and law is also very clearly pointed out in the 9th volume, pp. 480, 481, and though the passage to which we allude occupies, in the text of the Reporters, *two* pages, we cannot refrain from giving it entire.

“ Debt for a penalty of 500*l.*, for bribery at the Ludlow election, in 1839. Plea, *nil debet*, ‘by statute.’

“ This was a special jury cause, and a full special jury not appearing, *Talfourd*, Serjt., for the plaintiff, prayed a tales.

“ The attorney on each side had given Mr. Platt the associate a list of the names of those of the common jurors on the panel, whom he wished not to be called in the event of a tales being prayed.

“ Mr. Platt in taking the names from the balloting-box, whenever he came to a name which was on either of these lists, did not call that name, and with the omission of those persons, and the non-appearance of the others of the common jury, the panel was exhausted, and three more jurors were wanted.

“ *Ludlow*, Serjt.—‘ I apprehend that the case must stand over till the next assizes.’

“ *Talfourd*, Serjt.—‘ There is no challenge in a civil case except for cause.’

“ *Williams*, J.—‘ You must take the first three jurors who appear, unless they are challenged for cause.’

“ *Ludlow*, Serjt.—‘ I have no objection to try the case by nine jurors.’

“ *Talfourd*, Serjt.—‘ That would be error.’

“ *Williams*, J.—‘ Call over the jury in the ordinary way.’

“ Mr. Platt put all the names of the jurors again into the balloting-box, and the next juror who answered was Mr. Thomas Beeston.

“ *Ludlow*, Serjt.—‘ Mr. Beeston is a tenant of Lord Powis, whose interest at Ludlow is sought to be affected, and whose brother was a candidate at this very election ; and, secondly, Mr. Beeston was foreman of the jury in the case of *Hall v. Coleman*, tried here on Wednesday last, which was an action for a penalty for bribery at the same election, and therefore he is not indifferent. The object of challenging is that the parties should have a jury who are indifferent.’

“ *Williams*, J.—‘ I do not think that either is a sufficient cause of challenge.’

“ *Talfourd*, Serjt.—‘ I will waive Mr. Beeston.’

“ *Ludlow*, Serjt.—‘ That is *courtesy*.’

“ Mr. Beeston was not sworn on the jury. A full jury having been sworn, the case was gone into.”

Another favourable instance of this graphic style of writing may be found in *Raisin v. Mitchell*, id. 616—618 :—

“ The jury found for the plaintiff, damages 250*l.*, the amount claimed by him being upwards of 500*l.*

“ *Atcherley*, Serjeant, for the plaintiff.—‘ There must be some mistake.’

" *R. V. Richards*, for the defendants.—' There is not any mistake at all.'

" *Tindal*, C. J., asked the jury how they made up their verdict.

" The Foreman answered that there were faults on both sides.

" *Tindal*, C. J.—' Then you have considered the whole matter.'

" The foreman replied in the affirmative.

" *R. V. Richards* submitted to his lordship that the fact which the foreman of the jury had stated entitled the defendant to the verdict.'

" *Tindal*, C. J.—' No. There may be faults to a certain extent.'

" *R. V. Richards* requested his lordship to take a note of his having made the objection.

" *Tindal*, C. J., assented, and the verdict was entered by the associate for 250*l.*

" *Atcherley* and *Bompas*, Serjts., and *Curwood* for the plaintiff.

" *Thesiger* and *R. V. Richards* for the defendants.

" Attornies—*Jacobs* and *Warne*."

Fifty-five cases are to be found in these Reports on the subject of confessions, and no less than eight out of that number decide that the prisoner's examination is admissible without calling the magistrate or his clerk. See *Rex v. Hopes*, 7 C. & P. 136; *Rex v. Taylor*, id. 138; *Rex v. Foster*, id. 148; *Rex v. Rees*, id. 568; *Rex v. Reading*, 8 C. & P. 649; *Reg. v. Pikesley*, 9 C. & P. 124; *Reg. v. Hearn*, 1 C. & Mar. 109; and *Reg. v. Wilshaw*, id. 145. Another case decides that a statement made by a criminal was inadmissible, inasmuch as he was told that it would be used *for or against* him at the trial. See *Reg. v. Drew*, 8 C. & P. 140. The ground of this decision is not given, but, if we may venture to form a conjecture, it was this, that "the mind of man, especially the mind of a prisoner, is more prone to hope than fear." In two other cases confessions were excluded, the constable in one having told the prisoner that "he had better not tell a *lie*," and in the other that "she had better tell the *truth* or the offence would lie upon her, and her companion would go free." See *Rex v. Enoch*, 5 C. & P. 540; and *Rex v. Shepherd*, 7 C. & P. 486. These cases, *if correctly* reported, were probably decided on the ground, that with such advice as above stated the prisoners could scarcely do otherwise than tell deliberate *falsehoods*. It is satisfactory to find that *Rex*



v. Court, 7 C. & P. 486, is diametrically opposed to the two last-mentioned decisions. On the fertile subject of the right to begin, there are innumerable authorities, and those who wish to be thoroughly confused will do well to study the cases cited in the following note, which is appended to Harrison v. Gould, 7 C. & P. 580.

“(b) See Carter v. Jones, p. 64; Burrell v. Nicholson, p. 202; Davies v. Evans, p. 619; Warner v. Haines, p. 666; Atkinson v. Warne, p. 687; Smart v. Rayner, p. 721; Mills v. Oddy, p. 728; and Reeve v. Underhill, p. 773. See also, ante, Coxhead v. Huish, p. 63; Faith v. M'Intyre, p. 44; Lewis v. Wells, p. 221; Silk v. Humphrey, p. 14; Smith v. Davis, p. 307; Scott v. Lewis, p. 347; and Soward v. Leggatt, post.”

In the last case referred to in this note is the following dictum, “*Bompas*, Serjt. We much wish your lordship would lay down some rule, as we are much at sea about it; at present each learned judge has to decide in each particular case. Lord Abinger, C. B. That is very unfortunate,” p. 615. If we trusted the correctness of Messrs. Carrington and Marshman, it would seem that the learned judges themselves are on this subject sometimes as *much at sea* as the counsel. Thus in Craig v. Fenn, 1 Car. & Mar. 43, the lord chief justice is made to decide a point respecting the right to begin on a principle which would equally govern the following supposed case: “The plaintiff affirmed that a party was *dead*. The defendant alleged that he was *not dead* but *alive*. This was the only issue, and the judge held that as there was an affirmative on *both sides*, the plaintiff must begin.” We may here observe that these reporters, not content with the decisions of *all* the judges, have increased the bulk, if not the value, of their work, by publishing the opinions of Mr. Serjt. Arabin, Mr. Recorder Law, Mr. Serjt. Ludlow, &c. Now without meaning any the slightest disrespect to these last named gentlemen, we cannot help remembering that by Lord Campbell those cases alone were wont to be selected wherein were expressed the deliberate sentiments of the *ablest* judges. We will leave others more competent than ourselves to decide on the comparative merits of the two systems.

The notes appended to these reports are certainly not happy. A long discussion respecting Letters Patent of Protection, the

last having been granted one hundred and fifty years ago, 1 Car. & Mar. 40; another respecting Serjeants at Law and Precedence, 9 Car. & Pay. 371—4; a third setting out extracts from the Fleet Registers, and clothing disgusting expressions in the Greek character for fear they should *not* be observed, 8 C. & P. 579—581; and two medical disquisitions, with copious quotations, from the decent work of Dr. Parent du Chatelet, *sur la Prostitution dans la Ville de Paris*, 8 C. & P. 264, 265, and 267—269, are no very favourable specimens of this mode of writing.

In their *Precedents of Pleading*, also, Messrs. Carrington and Marshman are equally unfortunate; for, disregarding the fact that Mr. Chitty in his book on *Pleading* has given seven precedents on a similar subject, to which Mr. Chitty, jun. in his work has added three, they have set out in their first Number, p. 34, a declaration for tolls in six counts, and have added at full length, even to the counsel's signature, the very important, but not very rare, pleas of payment of money into court and the general issue. They tell us they have subjoined these forms, because "they may be useful in practice." With the same kind intention, though not with equal prudence, they have appended to the case of *Dowell v. Benningfield*, vol. i. p. 9, the form of a declaration which is bad on general demurrer. Then, in *Reg. v. Hearn*, 1 Car. & Mar. 109,——but we forbear to proceed: we will not drawl out our Review, as some of the reporters do their cases, to the greatest possible length; but promising, if necessary, to return to this subject, we will now close our observations for the present, in the earnest hope, we wish we could truly add in the firm expectation, that the Common Law, which we reverence, may experience some support from our feeble but sincere endeavours to purify its sources.

*J. P. T.*

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## ART. VI.—LORD CAMPBELL'S SPEECHES.

*Speeches of Lord Campbell, at the Bar and in the House of Commons; with an Address to the Irish Bar as Lord Chancellor of Ireland.* Edinburgh. 1842.

LORD CAMPBELL must possess an extraordinary stock of self-esteem, if he is not by this time convinced of a fact which the newspapers have shown an extreme anxiety to impress upon him,—that the publication of his speeches is a mistake; that it was all very well for Curran and Erskine, or Lord Brougham, to make this sort of bequest to posterity, but that for “plain John Campbell” to affect the honours of the rhetorician is preposterous. He himself appears to have had a lurking consciousness that he does not quite come up to the mark, for, in the dedication to his brother, he insinuates pretty broadly that these are not the orations he would have delivered in times more favourable to the bent of his genius—like the boy who, by way of apology for the tattered state of his small-clothes, pleaded that they were not the trowsers he had at home.

“To Sir George Campbell, of Edenwood,

“My dear Brother,—You must permit me to prefix your name to this volume, as I have prepared it for publication at your request. You suggested that I might well employ a little of the leisure I now enjoy in revising and editing some of my speeches at the Bar and in Parliament.

“I fear that notwithstanding your partial feelings, you may be disappointed. Even if I had been capable of making any Speeches worthy of being remembered, you must be aware that in quiet times, such as we have lived in, opportunities are very rare for delivering addresses in Courts of Justice which can be of permanent public interest;—and I was a law officer of the Crown during the greatest part of the period I had a seat in the House of Commons,—where the usage now is that subordinate Members of the Administration take part in debate only when subjects connected with their respective departments are under consideration,—leaving the general defence of the policy of the Government to the gifted individuals who are selected to compose the Cabinet.”

“Oh, for one hour of blind old Dandolo!” Oh, for the day when the law-officers of the crown were thus described by the

historian :—" He (Lord North) was seated on the Treasury Bench between his attorney and solicitor-general, *magis pares quam similes*; and the minister might well indulge a short slumber whilst he was upheld by the majestic sense of Thurlow on the one side, and the skilful eloquence of Wedderburne on the other."<sup>1</sup> Yet even in our time we have seen a law-officer take rank by common consent amongst the leaders of his party; nor does Lord Campbell do full justice to himself if he supposes that his late colleagues had not sufficient confidence in his knowledge, caution, and good sense to trust him sometimes with the general defence of their policy, had he thought proper to volunteer upon the forlorn hope.

With regard to the alleged scarcity of opportunities for delivering addresses of permanent public interest in courts of justice, a glance at Lord Campbell's table of contents is quite sufficient to show that he, at all events, has no right to rely on such a plea. If such cases as those of *Norton v. Melbourne*, Lord Cardigan's, Medhurst's, Frost's, Hetherington's, Hansard's, &c. do not afford scope for forensic eloquence, we are under some unaccountable misapprehension regarding it. The truth is, a fine speaker makes his topics instead of being made by them; and there is something perfectly ludicrous in the notion of an ex-attorney-general's speaking of himself as a mute inglorious Erskine, or mourning over the unknown and unappreciated stores of fire, fancy, thought and feeling which he bears with him into retirement.

" However, I offer you some specimens of my efforts—forensic and parliamentary—which perhaps you may not be ashamed of, and which may escape severe censure from my contemporaries. Amidst all the difficulties I have had to encounter, and the disappointments I have experienced, I have never forgotten the motto in the schools at St. Andrew's, our Alma Mater—

" *Αἰὲν ἀπιστεῖν.*

" I should rejoice if I could think that this would be a lasting memorial of a friendship—as warm and as steady as ever united Brothers—which neither time nor distance nor difference of pursuit has been able to interrupt or impair."

The Times, comparing Lord Campbell's success in life with his qualifications, professes complete scepticism as to his diffi-

<sup>1</sup> Gibbon's Autobiography.

culties and disappointments; but he did experience an unconquerable difficulty in getting Lord Abinger to resign in his favour, and Lord Langdale's nomination to the Rolls was a grievous disappointment to him, as indeed it has since proved to most people. The assurance that he had never forgotten the motto at St. Andrew's, was needless, for on the northern bank of the Tweed it is currently rendered "always to get money"—a pursuit in which his energy was only equalled by his skill. "If Campbell," remarked the late Mr. Perry, "had engaged as an opera-dancer, I do not say he would have danced as well as Deshayes, but I feel confident he would have got a higher salary." The Preface continues:—

"It may be that my aspirations and hopes proving delusive, my existence in a short space of time may be known only to my children: *but they will be better pleased with the obscurity of their father than if he had gained dishonest fame*;—and they will have the consolation to reflect that he never abandoned his principles or his party, and that by remaining true to the cause of civil and religious liberty he always sought the good of his country and the happiness of mankind."

The sentence in italics would be a puzzler, as implying the incompatibility of honesty with fame, were it not understood to refer to the same individual who is almost invariably suggested by the following passage in the Rev. Sydney Smith's admirable letter on Mackintosh: "If he had been arrogant and grasping; if he had been faithless and false; if he had been always ready to strangle infant genius in its cradle, always ready to betray and blacken those with whom he sat at meat; he would have passed many men, who, in the course of his long life, have passed him." But without charging Lord Campbell with being either arrogant and grasping, or faithless and false, we should be sadly at a loss to account for his comparative obscurity by his good qualities. What sacrifice did he ever make to principle? What opportunity of distinction did he ever forego from diffidence? When was he ever prevented from asking for anything he wished for by delicacy? We join our willing testimony that he never abandoned his principles or his party, and when he wants a character we shall be most happy to add that he never picked a pocket, at least in a manner to bring him within the reach of the law;

but as for his seeking the good of his country and the happiness of mankind, the plain matter of fact is, that "they lay in his way and he found them" as he was seeking for his own. A painstaking and skilful advocate, he had gradually worked himself into the front rank of the profession, ready to put in for the honour and emoluments of office, precisely at the proper moment, the accession of the Whigs to power: an Attorney-General of a government which through its Chancellor stood pledged to extended measures of law-reform, he naturally and necessarily undertook the conduct of sundry highly beneficial enactments through the House; he did his duty, but he did no more; the bills would have been carried just the same had he never existed, and when Lord Campbell, whom we are far from wishing to sink below his proper level, arrogates a place amongst the benefactors of mankind, we are tempted to exclaim with Dr. Johnson when an injudicious friend was unduly exalting a respectable but common-place member of society,—“Say no more about him, Sir, he fills a chair.”

But a graver charge remains. Why is the Speech for Lord Melbourne placed at the commencement of the volume, out of its proper order? Or why published at all, so long as a single person is living who could be hurt by a revival of the calumny? since a revival of a calumny it is, to say, such and such was urged against you five years ago, and such was my eloquent reply. A woman's reputation is like the plumage of the moth, which cannot be handled, even for the purpose of putting it out of harm's way, without injury; and Lord Campbell is not remarkable for the delicacy of his touch. Fraternal affection is a charming sentiment, particularly where the gratification of it goes hand in hand with that of one's own vanity, and we dare say this speech has proved nice, agreeable, exciting reading to Sir George Campbell of Edenwood; but did it never occur to either of this illustrious pair, that Mrs. Norton had brothers and sisters too, fondly, fervently, admiringly and confidently attached to her; who would gladly bury all recollection of the day when her name was made the butt of either offensive or defensive ribaldry, and when they tried in vain to cheer her by assurances of never-ceasing affection and esteem, as she sat in the fearful agony of expectation, whilst the game on which her whole future life depended was played out by

strangers in utter disregard of her feelings and interests. For this is one of the characteristic incidents of our famous and anomalous action of *crim-con*. The lady is no party to it; and the sole object of the defence is to bring off the gentleman. Sacrifice her, therefore, without scruple; and give yourself no trouble about charges that simply leave an enduring stain upon her name, so long as they do not justify a jury in inferring the last extremity of guilt. Thus, in the present instance, Lord Campbell saw that the plaintiff's case had made no impression, and that he could win his verdict in a gallop; he therefore, prudently as regarded his own client, declined calling witnesses; but if the Sheridan family or (we do not hesitate to add) Lord Melbourne could have been consulted, they would most assuredly not have rested until every particle of imputation had been proved false by direct testimony, as it might have been. We name this as one amongst many reasons for the temporary suppression of the speech. Strong as is the conviction left upon the reader's mind by the arguments, it falls far short of that which would result from a full acquaintance with the facts.

We cannot well examine this pet production of Lord Campbell's in detail, without being in some sort guilty of the indelicacy which we blame in him, but it would be unjust to him not to make a few extracts, as he evidently deems it the keystone of his forensic fame.

The trying circumstances under which he rose are stated in the introduction :

“ In addition to the importance attached to the trial from the rank of the defendant and the beauty and literary celebrity of the lady, whose conduct was to be investigated, the general feeling was, that the stability of the existing administration depended upon the result ;—and if the verdict had been against Lord Melbourne, he could not have retained his position in the councils of his sovereign. The newspapers had very improperly canvassed the subject before the day of trial—giving most exaggerated representations respecting the evidence to be adduced, and particularly respecting certain letters said to have been discovered by Mr. Norton in his lady's writing-desk. The eyes of all Europe were turned to the scene, and couriers were ready to start to the principal courts on the continent, with news of the verdict.



“ The trial began at half-past nine in the morning.

“ Sir W. Follett opened the plaintiff's case, with his usual tact and ability. The examination of the witnesses for the plaintiff did not conclude till half-past six in the evening. Being somewhat exhausted,<sup>1</sup> and rather afraid that I might not have a favourable hearing at so late an hour, I proposed an adjournment till the following day. This was opposed by Sir W. Follett, who urged that the defendant's counsel should not have farther time to deliberate whether they would call witnesses, or to determine what witnesses they would call.

“ Lord Chief Justice Tindal said, the thought he trial ought to proceed, unless the defendant's counsel intended to call a considerable number of witnesses.

“ The jury expressed a strong wish that the trial should finish that night.

“ It was then agreed that the Court should adjourn only for twenty minutes,—at the end of which time the trial proceeded.”

<sup>1</sup> “ It so happened that having lain awake from anxiety a great part of the night before, I had fallen asleep towards the morning, and I was not called till near the hour fixed for the commencement of the trial, so that I was obliged to hurry away without breakfast, and found the utmost difficulty in gaining admission to the Court.”

After nine hours and a half of excited attention, neither judge nor jury can be in a fit state for the patient comparison of evidence, and a counsel must be possessed of Herculean power who is still able to discharge his duty without flagging. We have certainly known it urged by very high authorities (the late Sir Samuel Shepherd for one), that it was most advantageous for the client to proceed whilst the interest was unabated and the facts fresh in the memory; but this is true only of cases where nothing more is necessary than to follow up the prevalent impression. If a new line were required to be taken, it would be found as difficult to effect the movement in a state of physical exhaustion and with a jaded jury, as to commence a fresh attack with tired troops. One of the ablest tacticians that ever practised at the bar has always attributed the conviction of Lord Donald (Cochrane) to the refusal of an adjournment, which would probably have enabled his counsel to foresee and avoid the fatal error of contradicting instead of explaining the facts which bore most strongly against him; and wherever the

plaintiff's case is not narrowed to a point, the defendant always lies under a disadvantage in being compelled to answer on the instant. How could Lord Melbourne know before hand what period of his six or seven years acquaintanceship was to be singled out? Moreover, it may well be doubted whether, had any specific contradiction been deemed necessary, he was then prepared with evidence to prove the most damning, namely, that during the greater part of the three months when Mrs. Norton was alleged to have received daily visits in her drawing-room, she was confined by a dangerous illness to her bed.

The exordium is common-place enough, and the rhetorician first appears in the attempt to describe the plaintiff and his wife :

“ In this case, gentlemen, nothing ever passed to give alarm or uneasiness to a doating and fastidious husband, from whom nothing was concealed. Mr. Norton, the plaintiff, is a man of honour ; he was tenderly attached to his wife ; he was fully aware of the intercourse between her and Lord Melbourne ; he never disapproved of it, for he knew it to be innocent.

“ Need I do more than remind you of the general features of this most extraordinary case? In the year 1827, the plaintiff, of a noble family, and presumptive heir to a peerage, but depending upon his exertions in the honourable profession of the law, was united to Miss Sheridan, a young lady who may well be proud of the race from which she springs, but who had for her dowry only her beauty, her talents, and her virtues. The union was most auspicious, for they were rich in mutual affection, and that affection continued unabated till the 29th day of March, in the present year, when the unfortunate quarrel took place between them, which led to a separation. During that time, they were blessed with several children, to whom both parents were most fondly attached. According to the evidence of all the witnesses who have been examined, was there ever a more exemplary mother than Mrs. Norton? Notwithstanding her intellectual attainments, and the admiration they excited, she appears to have been devoted to the health and education of her babes,—to have been prouder of them, and to have been better contented when she showed them to her visitors, than if she had been decked out in the most costly jewels. Mr. and Mrs. Norton occupied a small house suited to their limited income ; but here they received an extensive circle of acquaintance and friends

of the highest distinction ;--and among these was Lord Melbourne, holding a high office under the government of Lord Grey, and now the first minister of the Crown. Mr. and Mrs. Norton went on in this manner till the fatal day I have mentioned ;--living together ;--visiting and receiving visits together ;--sleeping together ;--no change in her attentions or affection towards him ;--no change in her devoted attachment to her children.—You remember, gentlemen, her distraction when she was separated from them, before she knew that any suspicion was to be cast upon her honour ; how she forgot her own privations and sufferings, and flying about from house to house, in search of them, seemed to think she could have nothing more to ask from Heaven, if she could again press them to her bosom.

“ Can this woman be an adultress ? Can she have renounced all the obligations of religion and morality ? Can she have forgotten all the feelings of delicacy and decency, which are banished only by necessity from the most degraded of her sex,—and under her husband's roof have daily prostituted her person to another ?

“ Gentlemen, we, who practise in courts of justice, and are in the habit of hearing causes of this sort tried, know by experience what is the usual, the invariable effect upon the manners and conduct of a wife when she has listened to the solicitations of a seducer. She loaths and shuns the society of her husband ; she neglects all her domestic duties ; she becomes indifferent about her children, and she is willing to abandon them that she may escape with her paramour from the home she has dishonoured.

“ How then are we to account for this charge being preferred ? —From political intrigue and malignity. It arises from the baseness of some persons who have poisoned the mind of the unhappy plaintiff, misrepresenting facts to him, perverting his understanding, and making him a tool in their hands,—seeking to bring discredit on the defendant in the hope that, his private character being blasted, he may be hurled with disgrace from the high post he now holds,—

‘ I will be hanged, if some eternal villain,  
Some busy and insinuating rogue,  
Some cogging cozening slave, to get some office,  
Have not devised this slander.’

“ Gentlemen, this is an attempt which the honorable members of the party in politics opposed to Lord Melbourne would regard with indignation. You heard the name of Sir Robert Peel, the respected leader of that party, called in the morning to serve upon this jury. We might have struck him from the list in reducing the special

jury, but on the contrary, there he remains, and I should have rejoiced if he had been now serving as your foreman. He would speedily have seen through this plot, and he would have been eager to defeat and expose it. It is not by a false charge against a rival that he would mount to power.

“ In his absence I am equally confident, that truth will triumph, without knowing or caring to know the political principles of any one of you. It is enough for me to know that I address twelve honest Englishmen. Thank God, gentlemen, the administration of justice in this country is above all suspicion of taint from party politics, and jurymen as well as judges, within these sacred walls, are only desirous to discover truth and to act according to the dictates of conscience, without regard to the politics, the religion, or the station of the persons on whose rights they are sworn to decide.”

The quotation is happy and the topics are well chosen, but what a total want of felicity in the language or refinement in the thoughts. “ It is enough for me to know that I address “ twelve honest Englishmen ! ” This to a special jury of gentlemen.

The comments on the getting up of the case are strong and business-like — “ What apology can be offered for “ taking up the material witnesses to Womersley the seat of “ Lord Grantley, and detaining them there till the eve of the “ trial? Do you not believe that they were not only examined, “ but examined in a way to obtain the answers that were de- “ sired.” The omission to call a single near relation or intimate friend was also strongly put :

“ Is it not incumbent on the plaintiff honestly to inform the jury, by the most competent witnesses, of the terms on which he lived with his wife? Who are these witnesses? The relatives of the family. Why, then, is Miss Norton not called? She is the sister of the plaintiff. She lived under his roof for months in the year 1832, at the very time when the criminal intercourse is supposed to have commenced, and there never has been any difference between her and her brother. Would it not have been most material, that we should have known what she observed, and the opinion that she entertained of the conduct of her sister-in-law?

“ It is surmised that she is at Paris. But there, on the bench, by my Lord Chief Justice Tindal, sits Lord Grantley, the plaintiff's brother. Why is he not called? He could have given material evidence in support of the action, if it be well-founded; and I should have liked to have put a few questions to him, not only respecting

Mrs. Norton's exemplary good conduct as a wife and a mother, but likewise respecting the assembling of the witnesses previous to the trial, at his country-house, and respecting 'the diversions of Womersh' while they were there."

The next paragraph may well excite a doubt whether Lord Campbell did right in omitting to call witnesses :

" But, gentlemen, I have to complain of the suppression of important evidence, not only as to the general demeanour of the parties, but as to facts connected with the *corpus delicti*. To illustrate the importance of a witness being called or kept back, let me remind you of the advantage I gained by the cross-examination of Mrs. Morris. Before she was called, it was a fact in evidence, that on the 29th of March last, Mrs. Norton ceased to live in her husband's house, and was not allowed to see her children. Coupled with other evidence, and with the statements of my learned friend, it might from thence have been inferred that Mr. Norton having long counted over the damned minutes of him 'who doats, yet doubts ; suspects, yet fondly loves,' had at last discovered irrefragable proof of his wife's guilt, and of Lord Melbourne, before suspected, being the author of his dishonour. From Mrs. Morris's cross-examination it appears, that Mr. and Mrs. Norton having lived together without any interruption of their domestic felicity, down to the 29th of March, a sudden quarrel arose between them, and a separation followed, with which Lord Melbourne had as little connection as the judge presiding at this trial. There was to have been a great gathering of Sheridans and Grahams, at Frampton, the seat of her brother, Mr. Sheridan, in Wiltshire. She intended to have gone there, and to have taken her three children with her. For some reason not explained, Mr. Norton, unfortunately, was not invited. If he had been included in the invitation, in all probability, he would still have been the head of a happy family, and the confiding husband of an unsuspected wife. He was enraged at the supposed slight. Early in the morning, he gave positive orders to Mrs. Morris, that the children should not go ; and to prevent Mrs. Norton from taking them with her, which she, perhaps unjustifiably, was strongly inclined to do,—that she might not leave them behind to the care of servants,—that she might show them to her relations,—and that she might enjoy the solace of their caresses,—he sent them to Lord Grantley's house, or lodgings, in Berkeley-street, with a positive injunction that she should be debarred from their sight. Gentlemen, I saw you were deeply impressed with the account given by the witness of Mrs. Norton's

distraction and anguish, when, having first gone to Lady Seymour's, she traced the children to Berkeley-street, and was there informed that she could not see them. Seldom has there been drawn a more touching picture of maternal tenderness and distress. Next day, the children were carried to Wondersh, and she has never beheld them more.

“ The separation, when explained, is wholly inconsistent with the accusation subsequently made, and I may say, providentially becomes a proof of innocence.”

It is now well known that witnesses of the highest respectability were in court, prepared to prove that the quarrel had no connection whatever with any charge of infidelity; that, on the contrary, it originated in complaints made against Mr. Norton by his wife's family; and that it was in consequence of their refusal to withdraw these complaints nearly six weeks afterwards that the fatal step of an action was resolved upon, during all which time Lord Melbourne's name was never so much as mentioned as a defendant. The same persons could have proved that Lord Melbourne's hours of visiting were perfectly well known to Mr. Norton and his friends, and excited no suspicion. We cannot help thinking that evidence such as this, would have far more than counterbalanced the advantage of a reply—an advantage, by the way, prescriptively over estimated by the bar. With a special jury and a tolerably able judge, to suppress facts of importance from fear of a reply is generally a most injudicious description of finesse.

Perhaps the best parts of the speech are those which, for obvious reasons, we decline quoting—the comments on the evidence given by the discarded coachman and chambermaid. The remarks on the letters, so amusingly parodied in *Pickwick*, are not open to the same objection:

“ Of Lord Melbourne's letters to Mrs. Norton, three are selected as the most impassioned, most tell-tale, and most damnatory.

“ The first is in these words—

“ ‘ I will call at about half-past four or five.

‘ Yours, MELBOURNE.’

“ The next—

“ ‘ How are you? I shall not be able to come to-day, I probably shall to-morrow.

Yours,

‘ MELBOURNE.’

“ The last—

“ ‘ No house to-day. I will call after the levee, about four or half-past. If you wish it later let me know. I will then explain about going to Vauxhall. Yours,

‘ MELBOURNE.’

“ Gentlemen, there is no one better knows how to struggle with difficulties than my learned friend, and, keeping within the rules of honourable practice, to make the worse appear the better reason. I dare say, therefore, he judged well in producing these letters ; but I must say, that, in my own judgment, they only strikingly show the ridiculous nothingness of the case of his infatuated client.

“ The character of the intercourse between the parties might well be ascertained from their correspondence, and if there had been anything improper in that intercourse, in their correspondence there would be traces of it.

“ The first letter it may be said is an assignation ;—and it is so,—at the house of the husband,—where the paramour so anxious to be concealed was to ring and knock at the street-door in open day,—was to be admitted by the husband's footman,—was to be shown into the drawing-room—where other visitors were or might be admitted,—where the nurserymaid with her husband's children would probably be sent for ;—and, no bolt or bar interposing, the husband himself might enter when he chose.

“ Shall it be said that the second displays an earnest and agonizing solicitude about her health. ‘ How are you ? ’ However, he does not display much impatience to fly into her arms. ‘ I shall not be able to come to-day ! I *probably* shall to-morrow.’ Gentlemen, I cannot help thinking that this displays much more of listlessness than of love,—that the writing of it, short as it is, was probably interrupted by a yawn,—and that it is a fair specimen of the humdrum style of common acquaintanceship.

“ The last letter is rather more animated,—announcing intelligence always very agreeable to me, that there is no House, and speculating (as I sometimes do in such an event) on making a party to Vauxhall,—which I dare say was made with the concurrence of Mr. Norton, Lord and Lady Seymour and other relations and friends agreeing to join it,—where they were perhaps met by some of you, accompanied by your wives, daughters and friends, who may have made a similar party.

“ But Sir W. Follett gravely says, these letters show a great and unwarrantable degree of affection, because they do not begin and end with the words, ‘ My dear Mrs. Norton,’ or any other tender



appellative. There must be much love concealed, because none is exhibited. It seems there may be latent love, like latent heat, in the midst of icy coldness. There was the fulminating powder of love in each of these packets, which was to go off, and set Mrs. Norton in a blaze, the moment she opened them. My learned friend, perhaps, thinks it doubtful whether they might not be brought within the late act of parliament against the clandestine sending of dangerous combustibles, and, gentlemen, an indictment against Lord Melbourne on that statute, would not be more ridiculous than this action."

This strikes us to be a somewhat clumsy and elaborate description of facetiousness. However, the absurdity of endeavouring to found a damnatory conclusion on such premises was fortunately too palpable to require heightening; but some of the concluding topics were precisely of a character to bring the finer arts of advocacy into play. For example :

"I cannot contemplate without deep emotion the effect of your verdict upon the fate of this lady. In the pride of beauty, in the exuberance of youthful spirits, flattered by the admirers of her genius, she may have excited envy, and may not have borne her triumph with uniform moderation and meekness; but her principles have been unshaken, her heart has been pure,—as a wife her conduct has been irreproachable,—as a mother she has set a bright example to her sex. *If necessary, some indulgent allowance might have been asked for her manners, without questioning her honour.* My learned friend referred to the race from which she is sprung. Her family presents I believe an unparalleled instance of genius being displayed by five successive generations—mixed up at times with eccentricity—but ever free from dishonesty. The first member of the family of whom I have any knowledge was the friend of Swift, and is thus characterized by Lord Cork: 'Indigent and cheerful; yet in the midst of all poverty still a quibbler, a punster, a fiddler and a wit, who never suffered a day to pass without a rebus, an anagram, or a madrigal.' In spite of some eccentricities the friend of Swift was a man of integrity as well as a man of genius. His son, the friend of Johnson, was known for his attainments in literature, and for his unbending principles, although now and then quarrelling with his best friends, and among others with the great lexicographer. According to Boswell, the first of biographers, Johnson, however, always said of him, 'Sheridan is

a good man.' I have only to pronounce the name of his son Richard Brinsley Sheridan to recall to your recollection that he was the greatest dramatist and one of the greatest orators and statesmen who appeared in the reign of George III., and that in the midst of pressing pecuniary embarrassments brought on by imprudence, he yielded to no temptation, and was ever true to his party and his principles. His son was cut off in early life, but not before he had given earnest of talents which, if he had been spared, would have added fresh lustre to the name he bore. That son left three infant daughters destined to be the ornament and the charm of English society in the present reign;—Lady Seymour, whose name was mentioned by several of the witnesses, married to the eldest son of the Duke of Somerset, and Mrs. Blackwood, married to the heir of the Barony of Dufferin; the third is Mrs. Norton, now on her trial before you—for weal or for woe. Through what vicissitudes has she passed! Once a helpless orphan, depending like her sisters on the kindness of relations, she became destined like them to wear a coronet. How brilliant did her lot appear on the morning of the fatal day when she was deprived of her children! Young, beautiful, accomplished, highly connected, enjoying great literary reputation from her works—enjoying what was far more valuable, the esteem and confidence of her husband,—her acquaintance courted by poets and statesmen,—listening to the prattle of her lisping boys as they strove for her caresses! What must have been her subsequent sufferings? Figure to yourselves her surprise and her horror when the charge of infidelity was first brought against her."

How poor, tame, and unconnected is this paragraph. One might almost fancy that the learned counsel was reading from his brief. What had Lord Cork's or Dr. Johnson's opinion of Mrs. Norton's progenitors to do with the question of her innocence? or how is that enhanced by her or her sister's prospect of a coronet? The pith of the argument lies in the coarse sentence we have printed in Italics. It was no doubt suggested at consultation that a Sheridan was not unlikely to be guilty of an occasional breach of the *convenances*, and that some light speech or thoughtless frolic, capable of an uncharitable construction, might be proved against her. It is just possible, too, that some proud and sparkling repartee, aimed at envy, ill-nature or exclusiveness, might have been repeated to him. Nothing of the sort is proved or suggested by the evidence; yet the prepared ex-

planation must not only be blurted out at the time, but be preserved and printed for the edification of posterity.

Still more provoking is the mode in which he slurs over, and mixes up with other topics, the very one of all others on which a high-minded advocate would have placed his chief reliance—we mean, the folly and grossness of supposing that a beautiful young woman, celebrated for the variety and intellectual character of her accomplishments, could not receive frequent visits from a man of more than twice her age without becoming an object of guilty passion or falling a victim to his seductiveness. As regards the one party, it was quite natural that she should feel flattered by the distinction, as well as gratified by the frank, unaffected, high-bred bearing, and rich cultivated conversation, of such a man; and here we must be pardoned for observing that, if a marked preference for the ex-premier's society were inconsistent with the strictest notions of female delicacy, the throne itself might have proved an insufficient shield against the shafts of slander. As regards the other, there is something to our minds ineffably disgusting in the thought that any man, much less a man of fifty-five, may not contract a friendship or a habit of daily intimacy with a woman, without having a direct design against her husband's honour imputed to him—

“ No friend like to a woman man discovers,  
*So that they have not been nor may be lovers.*”

And on a nice analysis it will be found that the utter absence of rivalry is the grand secret, and that the sexual feeling is far more likely to break or weaken, than to confirm or constitute, the tie. It was the fine remark of Vauvenargues (whom Talleyrand used to prefer to Rochefoucauld) that a woman was a thousand times more likely to become the mistress of a man she had never seen, than of one with whom she had been in the habit of living on terms of friendship. But we are gradually verging on dangerous ground, and it would have required an Erskine to assert the rights, and define the limits, of companionship—to point out the demoralizing effect of the maxim upon which Mr. Norton's counsel were compelled to rest, and strike away the foundation of their case, instead of

pulling it down piecemeal. Lord Campbell is not an Erskine, and simply repeats parrot-like instead of illustrating and amplifying the thought :

“ But before I conclude, I am bound according to the express instructions I have received from Lord Melbourne, to declare in his name, and in the most solemn and emphatic manner, that he is not guilty of the charge brought against him, and that neither by word or deed has he ever abused the confidence reposed in him by Mr. Norton. I know well, gentlemen, that you cannot act upon this assertion, and I do not seek to influence by it that verdict which you have sworn to find according to the evidence. Look to the evidence, and if it supports this charge, I desire you, regardless of the consequences, to find a verdict for the plaintiff with exemplary damages. But the evidence, instead of bringing home guilt to the accused, only reflects disgrace on the accuser. The accusation is built simply on the frequent visits of Lord Melbourne ;—and he by adverse fate being now without domestic ties, you are called upon to believe, and to act upon the belief, that he could not without immoral designs and indulgences retire from court formality and insincerity—from the noise of faction and from the cares of state, to enjoy the repose of private life—to taste the pleasures of refined conversation—and to witness the sports of children, who would neither flatter nor deceive him. Might he not have

‘ ——— his happier hour

Of social converse ill exchanged for power ? ”

The quotation again is exceedingly happy, but we wish the immediately preceding sentence had been suppressed. Lord Melbourne is not a Timon, to shun the converse of grown gentlemen and ladies for fear of their taking advantage of his simplicity. Possibly Lord Campbell had been reading about the king or minister (we forget which) who, on being found on the floor with his children by an ambassador, inquired—“ Are you a father ?—and on being answered in the affirmative, exclaimed—“ Come then, boys, we may go on with our sport.” Or an extract from one of Mrs. Norton's letters to her husband, read at the trial, might have suggested the allusion : “ Spencie's good things I must not omit. We were sitting with Charlie, and he was dull. ‘ Now,’ says he, ‘ let's resign.’ ‘ What do you mean,’ said I. ‘ People says *resign* when they *goes out*,’ quoth he. So much for living with ministers.”

Immediately after the paragraph last quoted, comes what for want of a better must be termed the peroration of the speech :

“ Gentlemen, this action must have originated in a scheme to overthrow the present government by traducing the private character of its chief, though the honour of an innocent female, and the happiness of a respectable family should be the necessary sacrifice. There is not ~~more~~ moral guilt in the assassinations and poisonings to which the struggles of political parties have given rise in other countries and other ages. This attempt, if successful, would be more cruel to its victims—by allowing them to live when life has become a burthen, and more dangerous to society, as it would be perpetrating a great crime through the forms of law, and committing sacrilege in the very temple of justice. But such an attempt never can succeed till Englishmen have lost the love of truth, the fairness, the firmness, by which they have ever been distinguished, and until trial by jury, hitherto the palladium of our rights and liberties, shall be converted into an instrument of our degradation and oppression.

“ Gentlemen, I sit down in the calm conviction, that you will without a moment's hesitation free my client from the groundless charge brought against him,—and in the fond hope, which I may be pardoned for expressing, that the plaintiff—at the first look of tenderness being forgiven by his wife the unfounded suspicions he has entertained,—his children may in a few hours be clinging round their reconciled parents,—and that his home may again become, and may long continue, the abode of undoubting love, and domestic felicity.”—p. 31.

So concludes this famous oration, which Lord Campbell boldly places in the front of the battle whilst fighting against the united voices of his contemporaries, with the sole exception of his brother, for the name and enduring honours of an orator. He would have stood a better (though at best a bad) chance for them, had he trusted exclusively to tradition ; for, viewed with reference to the limited object of the advocate and the circumstances, it was universally regarded at the time as an exceedingly clever, effective, working speech—with no grace of language, richness of imagery, or felicity of arrangement, it is true—but still impressing strongly on the minds of the hearers the gross improbability of the accusation and the worse than suspicious character of the witnesses.

The same remarks apply, and with still greater force, to the

rest of the forensic speeches. If we had found them in a newspaper, we should have said nothing either one way or the other, for it was almost a matter of course for Lord Campbell to discharge his duty effectively ; but when we find them collected in a volume, and are told to pick out passages fitted to delight the reader of taste or afford examples to the student in rhetoric, we find ourselves completely nonplussed, and are compelled to return *nulla bona*. There is one paragraph, however, in the speech on Medhurst which we are tempted to quote for Mr. Wakley's benefit :

“ He is charged with murder only by the coroner's inquest,—on which, technically speaking, he may be lawfully tried and convicted, but which, I must use the freedom to say, in no degree rebuts the presumption of innocence. For the deliberate verdict of twelve Englishmen on their oaths, after listening to a sound exposition of the law, I have the most unfeigned respect ; but for the inquest of a coroner's jury in a case of sudden death I have no respect at all. The constable gets together whom he can first find—no qualification being required in the jurymen. They meet amidst the fumes of an ale-house. Whatever rumours have been spread in the neighbourhood respecting the fate of the deceased and the supposed murderer they have heard ;—and the more horrible and improbable such rumours are, they are the more apt to believe them. To calm their imaginations—they are by law required to view the dead body, with its convulsed countenance and ghastly wounds, before they begin their investigation ;—and the coroner who ought as judge to explain to them nice legal distinctions, and to enlighten their understandings, may be a low legal practitioner, unqualified for such duties,—or *a person wholly uninitiated in law, who has been elected to the office by popular arts*, and who seeks to inflame the prejudices of the jury instead of allaying them. In extenuation of the recklessness with which a verdict of wilful murder may be pronounced by such a tribunal, I should mention that the jury and the coroner are not aware of the solemnity or consequences of the act about which they are employed. Nor is this to be wondered at ; for I believe I may positively assert that, in the annals of the administration of criminal justice in this country, there is not a single instance of a conviction for murder on the finding of a coroner's inquest. In the vast majority of instances, the instrument is quashed for gross informality ; and if there be any ground for the charge, an indictment for murder is found by the grand jury.”

If this description be correct, Lord Campbell should devote some portion of his leisure to abolish or reform the institution without delay.

We doubt whether any human being, not even Sir George Campbell of Edenwood, could be induced to read through the speech on parliamentary privilege, occupying 272 pages. We say nothing against its learning or ability, but we say that the pith of it has been preserved by Messrs. Adolphus and Ellis, and we wonder the publisher did not make the same suggestion which is said to have been made to Dr. Prideaux by the bookseller to whom he submitted the manuscript of his celebrated *Connection*, "Pray, doctor, could'nt you manage to put some fun into it?" There is no fun or provocative to laughter here, except an interlocutory misstatement of Lord Brougham, who thought proper to take a seat by Lord Denman, and being present was of course unable to hold his tongue. The learned counsel having intimated that *Burdett v. Colman* was argued before the House of Lords—

"Lord *Brougham*.—It never came to the House of Lords. I was counsel in *Burdett v. Abbott*; Mr. Clifford argued it in the Exchequer Chamber, and he died before 1817."

At the head of the report of the next day's proceedings we find :

"Lord *Brougham*.—Mr. Attorney, I find I was quite wrong yesterday; *Burdett v. Colman* was argued in the House of Lords; but Mr. Courtenay argued it, and not I; he was my junior."

The parliamentary speeches are not within our jurisdiction, and we are not tempted to extend it in their favour. The address to Mr. Justice Littledale on his retirement is still fresh in the recollection of the bar, and we quite agree in the unanimous judgment of approval they passed upon it. A recent critic sees something approximating to the ludicrous in the hope, that the learned judge "might find occupation and delight in the renewed pursuit of those abstruse as well as elegant studies in which he early gained distinction." It is objected that he was more likely to find delight in a rubber of whist than in the differential calculus. Very probably, but would it have been graceful to tell him so, or to wind up with the quotation, "a good soft pillow for that good



white head?" Unless we are mistaken in the moral of the parting scene between the Archbishop and Gil Blas, Lord Campbell's compliment was precisely that which was most likely to gratify.

To grace his parting address to the Irish bar, Lord Campbell lays violent hands on a quotation to which resigning statesmen prescriptively lay claim. Pitt, Canning, and Peel have each adopted it, but by printing two words in the last line in italics, Lord Campbell has made it peculiarly his own:

"Laudo manentem. Si celeres quatit

Pennas, resigno quæ dedit—

————— probamque

Pauperiem *sine dote* quæro."

On the strength of Mr. Perry's aphorism, we will lay odds that his Lordship gets the pension, or an equivalent in meal or malt, before he dies.

*H.*

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#### ART. VII.—THE DUBLIN LAW INSTITUTE.

*The Papers of the Dublin Law Institute.*—No. 1. *Opening Address by the Principal of the Society.*—No. 2. *Address by His Grace the Archbishop of Dublin, on the Intellectual and Moral Influences of the Professions.* Dublin: Reprinted from the "Legal Reporter," by P. D. Hardy, for the Society of the Dublin Law Institute. 1842.

THE founders of the Dublin Law Institute are richly entitled to the gratitude of their country, if only for the efforts they have made and are making to elevate a profession which occupies a much more important place and exercises a much greater degree of influence in Ireland than here, and facilitate a study which, till very recently, was abandoned to caprice or accident. The Irish student got called to the bar as soon as he could, and took his chance for picking up professional knowledge as he wanted it; or, on his arrival in London, placed himself in a conveyancer's or special pleader's chambers, where he either idled away his time or pursued what Mr. Warren calls the analytical method, in other words, no method at all. It is very true he might have read Blackstone or any other introductory work beforehand; but what is everybody's business is nobody's, and what may be done at any

time is seldom done at all. For one lad of eighteen or twenty who will read a law book by himself without a precise object, fifty will hurry down to a lecture room, and take a sufficient interest in the subject to talk it over with their companions and look out the authorities regarding it. Moreover, we regret to say that most of the best elementary books have been partially superseded by the progress of law reform, and more than half of Blackstone has already become matter for the antiquary.

It is unnecessary to pursue the topic, for it is excellently handled in the first of the Papers now before us, the opening address of the Principal, delivered to vindicate the usefulness and announce the progress of the Society :—

“ The Society of the Dublin Law Institute having now reached its third year, it shall be my gratifying duty to lay before you a review of its progress, its objects and its results, from the date of its foundation as a public institution. It had its early struggles and difficulties, but these were of shorter duration than might have been reasonably anticipated ; for no sooner were its objects fully scanned, and its merits thoroughly understood, than it received the sanction of those individuals, whose fostering encouragement has enabled it to reach its present position. Those supporters were not confined to the youthful or unenlightened students, who would have had direct and personal interest in the establishment as a means of acquiring instruction. There were also the master-minds of the legal profession, whose success no difficulty had been able to impede—whose perseverance had surmounted each perplexing obstacle—but whose manly and honourable feelings enabled them to hail, with disinterested approbation, the foundation of an Institution for directing the studies of those embarking in legal pursuits, to rejoice in the first attempt made in this country to teach law as a science ; they could not avoid lamenting, that in their younger days there was no institution of this description of which the law student could avail himself ; and whilst they deplored the enormous waste of time they had suffered in their own early reading, they rejoiced that the Institution would relieve all future students, availing themselves of its advantages, from this loss ; that it would contribute to the respectability and efficiency of the Irish bar, and that it would afford to the community in general the means of acquiring a knowledge of the laws and constitution of the country. The professional School or Institute has passed the ordeal of a second session. It is known to the public. It has undergone the severe and criticising test of professional opinion. It has gained new and valuable sup-

porters. It has preserved the confidence of the enlightened and intellectual friends who approved of its foundation. It has survived the pestilential attacks of ignorance, folly, prejudice and malevolence. The Institute presents to students the aid of six experienced professors, approved of by the Benchers, and known to both the profession and the public. The synopsis published, of the courses of instruction, renders unnecessary my dwelling upon the plans pursued in the Institute; suffice it now to observe, that students and members of the bar who attended the first, I might add experimental, course of instruction in the Institute, have evinced by attendance a second and a third year, that the time thus dedicated was not altogether mispent. How very different a system the Institute presents to that so quaintly described by Roger North, in his discourse on the study of the laws. "Such," says he, speaking of the novice, 'as are willing and inquisitive may pick up some hints of direction; but generally the first step is a blunder, and what follows loss of time; till even out of that a sort of righter understanding is gathered, whereby a gentleman finds how to make better use of his time, and of those who are so civil as to assist a novice with their advice what method to take; few agree in the same; some say one way, some another, and amongst them rarely one that is tolerably just. Nor is it so easy a matter to do it that every one should practise to advise, for most enter the profession by chance, and all his life after is partial to his own way, though none of the best.'

"The beneficial influence this society has produced, is evinced in a variety of channels; and we have the satisfaction to know that this fact has been most frankly admitted by some of the most distinguished judges in the land. Independent of the publications which have emanated from the society, the increase of legal works in this country is considerable. The Legal Reporter, the only law periodical published in Dublin, had its origin since our foundation; a work which has found its way out of Ireland, and is now desired in America as a channel for communicating the proceedings of our Institute."

The Legal Reporter is a weekly publication, conducted much on the same plan as the London Legal Observer. The original articles are generally well written; the reports of decided cases bear a good character for accuracy; and altogether the work gives a highly favourable notion of the progress of jurisprudence in the sister country.

We are glad to find that the patronage of this Institute has not been confined to Ireland. Donations of 100 guineas each have been received from Gray's Inn and Lincoln's Inn, whose

example it is to be hoped will be followed by the Inner and Middle Temple, if their extravagant outlay on the Temple Church has left them the means of being generous. We also quite agree with the Principal as to the advantages that would result to the community from a more extended study of the law; but he must excuse us for suggesting that he pursues the argument a little too far, when, after a graphic account of the light in which law and lawyers are regarded by the lower classes, he proceeds in this manner:

“ In fact, law seldom appears, or is comprehended, except in its most appalling aspect. The evils resulting from the neglect of education in this respect are numerous. Ignorance produces crime, and affords protection to the criminal—to the outlaw it offers a house of refuge—to the thief a ready welcome—to the false witness a very general justification. I might appeal for the general accuracy of this lamentable statement to many whom I have the honour to address, and who could, from their own experience, corroborate all I have asserted by illustrations too painful to dwell upon for any other object than the one here sought; the removal of the producing cause. I may be permitted to give a scene which came under my own observation some years ago. In the capacity of high sheriff of a northern county, I was called upon to attend the pillory of an individual convicted of wilful and corrupt perjury. The period appointed arrived for exposing the convicted offender in his degraded position to an assembled multitude, many of whom, no doubt, had witnessed, some perhaps had comprehended, the extent of his perfidy. On entering the pillory, what were the sensations, what the conduct of its occupant? Was there evinced a deep feeling of remorse for the position in which he then stood, for the injury he had endeavoured to inflict upon his neighbour, for the outrage he was guilty of to society? Was there a single symptom of regret for the breach of the laws of man—did he tremble before his God whose law he had not only broken, but upon whom he had called as a witness and invoked as his assistant in the perpetration of the crime? Feelings such as these were (let us charitably presume) to him unknown; man stood the representative of savage nature, in ignorance encompassed, the enormity of the offence he had committed apparently unknown to him, but as if confident of the sympathy of the spectators, instead of their aversion, he rejoiced in the distinguished position in which his conduct had placed him; with his head in the pillory, exultingly, he vociferated to the assembled multitude a succession of cheers for those upon whose behalf his false testimony had been given.

“ And why do we find amongst persons in a higher walk of life, who have some knowledge upon all matters, except the laws intended to regulate society, a disinclination to discharge many duties which the community and good order expect them to perform? Why do we frequently find the person who should stand in the position of prosecutor, as well as the witness who should give evidence, each decline the performance of those high duties? Reflection will convince us that the same cause producing the crime entitled to prosecution, withholds the prosecutor and witness from bringing that crime to light; and I shall all fearlessly repeat, that the source of this abandonment of the highest social duties is for the most part ignorance, gross ignorance of the principles upon which laws are enacted, and of the constitutional remedies for obtaining their repeal when unsuited to the exigencies of the state.”

Far be it from us to deny that, if the worthy Principal had been allowed an opportunity of pointing out to the offender mentioned in the first paragraph the nature of the laws of evidence or the vast importance of truth and justice to society, that same offender might not have been induced to adopt a more edifying demeanour, or, taken in hand at an earlier period of his career, might not have managed to escape the pillory; but we much doubt whether prosecutors and witnesses would be rendered more eager to come forward by an increase of legal knowledge. On the contrary, those who are best acquainted with the annoying character of the duty, are precisely those who are most likely to hold back. Once upon a time, on the eve of the long vacation, two friends of ours, about to start for a continental trip, were strolling through the Strand, when one of them felt a tug at his pocket, and turning round saw his pocket handkerchief in the hands of a lad who instantly turned down an alley and made off. He was making after him, when he found himself arrested by his companion, who held him tight till the lad was fairly out of sight. By this time he was breathless with passion: “What on earth can you mean by holding me?—Don’t you see that fellow has got my handkerchief?” “Yes, and he should have mine too if it would enable him to run the faster; for if he is caught, we shall both be bound over to attend the Old Bailey Sessions, be kept hanging about the court for a week at the risk of catching the gaol fever, be cross-examined by —, and misrepresented by the reporters.” Was the individual

who talked in this style unacquainted with law? Alas, he was one of those who had studied it on the most comprehensive principles, and the main object of the journey contemplated by the friends was to visit the law-schools of Germany.

The only effective mode of lessening or removing the prevalent disinclination to appear in a court of justice in the capacity of witness or prosecutor, is to lessen the attendant annoyances, for we very much fear that the increase of knowledge, legal or general, does not necessarily repress the suggestions of selfishness or stimulate the sense of public duty.

We cordially hope that the expectation expressed in the following sentences may be fulfilled :

“ It is confidently anticipated that this society will henceforth be bountifully supplied with papers instructive and interesting to the community, from the distinguished members of the several learned professions at home, and that we shall not be driven to foreign climes for an undue proportion of written contributions, when there exist among ourselves inexhaustible mines of intellectual wealth. The ordinary excuse of ‘ want of time,’ will not we trust be the substitute for the communication of ideas important to mankind. It has been observed by him to whose judgment the destiny of our country is now consigned, that he who finds time for everything—for punctuality in all the relations of life—for the pleasures of society—for the cultivation of literature—for every rational amusement, is the same man who is the most assiduous and the most successful in the active pursuits of his profession. We need not invoke the memory of Pliny to corroborate this fact.”

There is certainly no necessity for going back so far. As we formerly observed, Murray, Dunning, Wedderburne, Erskine, Shepherd, Romilly, &c. &c. associated with wits or cultivated letters to the last. Lord Tenterden amused himself with writing Latin verses, and Mr. Baron Bayley edited a prayer-book. The late Mr. Charles Butler, himself an eminent instance of versatility, tells us that Fearne was profoundly versed in medicine, chemistry and mathematics—had obtained a patent for dying scarlet, and solicited one for a preparation of porcelain—had composed a treatise on the Greek accent, and another on the Retreat of the Ten Thousand. The truth is, an active-minded man must always be doing something, and is driven to seek for relaxation in variety. That the most occupied members of the profession can find time for

other things, is shown by the fact that they always manage to find time for parliament.

The call has been already answered by one very eminent individual, always ready to co-operate in extending knowledge or crushing prejudice. The Archbishop of Dublin has contributed an address, which, though not composed with the care that could be wished, is excellently calculated to promote the objects of the society, if merely by setting an example to other persons of distinction.

Only a small part of this address, however, relates to the legal profession, and unfortunately not the best part. His Grace has done little more than give currency to an injurious fallacy, instead of probing the subject to the bottom in the masterly manner which is his wont. His illustrations of the moral and intellectual influences of the bar consist almost exclusively of quotations from Mr. Chadwick's article or essay on the Licence of Counsel, reviewed in a former Number,<sup>1</sup> and he has fallen into Mr. Chadwick's main error, if he thinks that either Lord Brougham or Sir Matthew Hale, as quoted in the following passage, is to be regarded as a sound interpreter of what is or ought to be the practice or feeling of the profession :

“ I have been supposing (as has been said) that he is one who would scruple to mislead wilfully a judge or jury by specious sophistry, or to seek to embarrass an honest witness, and bring his testimony into discredit ; but there is no denying that he is under a great temptation even to resort to this. Nay, it has even been maintained by no mean authority, that it is even a pleader's *duty* to have no scruples about this or any other act whatever that may benefit his client. ‘ There are many whom it may be needful to remind,’ says an eminent lawyer, ‘ that an advocate, by the sacred duty of his connexion with his client, knows in the discharge of that office but one person in the world—that client and none other. To serve that client, by all expedient means, to protect that client at all hazards and costs to all others (even the party already injured) and amongst others to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any others. Nay, separating even the duties of a patriot from those of an advocate, he must go on, reckless of the consequences, if his fate should

<sup>1</sup> Vol. xxv. 143.



unhappily be to involve his country in confusion, for his client.'—(*Licence of Counsel*, p. 3.)

“ On the other hand it is recorded that ‘ Sir Matthew Hale, whenever he was convinced of the injustice of any cause, would engage no more in it than to explain to his client the grounds of that conviction; he abhorred the practice of misreciting evidence, quoting precedents in books falsely or unfairly, so as to deceive ignorant juries or inattentive judges; and he adhered to the same scrupulous sincerity in his pleadings which he observed in the other transactions of life. It was as great a dishonour as a man was capable of, that for a little money he was hired to say otherwise than he thought.’—(*Licence of Counsel*, p. 4.)”

Lord Brougham was here speaking rhetorically and under high excitement. Take him (if you can find him) in a sober mood, and he will hardly contend that the obligation which a counsel contracts towards his client ought to override the general obligations of morality.

The opinions attributed, on somewhat loose grounds we fancy, to Sir Matthew Hale, are of a mixed character. In abhorring the practice of misreciting evidence or quoting precedents unfairly, he did no more than others, that practice having always been deemed disreputable in Westminster Hall; but if he habitually declined undertaking causes until he was convinced of their goodness, he did that which, done generally, would fatally impede the administration of justice, and infallibly undermine the respectability of the bar. The steps by which we arrive at this conclusion were detailed so recently that we should not feel justified in repeating them,<sup>1</sup> and it is hardly worth while to answer the assertion, that a barrister who intimates a favourable impression of a client's case without feeling it, is guilty of a lie. Mr. Good may turn out innocent, and at all events ought to be legally convicted; yet, according to the above doctrine, any barrister to whom he may apply is bound to decline defending him, or begin his speech by telling the jury that he has little or no confidence in his case.

*H.*

<sup>1</sup> Vol. xxv. p. 145.

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## ART. VIII.—LAW MAXIMS.—OF CRIMINAL INTENTION.

“*ACTUS non facit reum, nisi mens sit rea.*”<sup>1</sup> Lord Coke quotes this as illustrating his position, that, to constitute a larceny, the “*contrectatio fraudulenta*” must be “*cum animo furandi*,” citing Bracton, who says “*Cum animo, dico, quia, sine animo furandi, furtum non committitur.*”<sup>2</sup> This maxim applies, only where it is sought to make a party liable *criminally* for acts injurious to others; for in *civil* proceedings for such acts (*e. g.* for making false representations of solvency, by relying on which the plaintiff has incurred loss) the rule is otherwise, the intent being there held immaterial, if the act done is in its results injurious to another.<sup>3</sup>

If a party makes a representation false to his own knowledge, intending thereby to benefit himself, he is guilty of fraud *in fact*, viz. actual fraud in the common acceptation of the word; and is accordingly liable at all events, *civiliter*, for any injury which can be traced to the having acted on such his representation. Moreover he is similarly liable, if he make such representation knowing it to be false, though he may not propose benefit to himself, or perhaps intends to benefit a third person, for he is equally guilty of *legal* fraud, and his intent in so acting, whether innocent or otherwise, is immaterial.<sup>4</sup> The law (says Chief Justice Tindal) will infer an improper motive, if what the defendant says is false within his own knowledge and is the occasion of damage to the plaintiff.<sup>5</sup>

The *evidence* of criminal intent is next important to be considered. Where an act in itself indifferent becomes criminal, if done with a particular intent, such intent must be proved by those who charge it.<sup>6</sup>

This principle holds in civil as well as criminal proceedings. Thus the act of *buying* by sample in a market where toll is

<sup>1</sup> 3 Inst. 6, 107.

<sup>2</sup> Lib. 3, chap. 32, fol. 150; and see cases collected, 2 Marsh. R. 573; and 2 Jardine's Crim. Trials, 244.

<sup>3</sup> Per Lord Kenyon in Haycraft v. Creasy, 2 East, 91.

<sup>4</sup> Foster v. Charles, 7 Bing. 105; 6 Bing. 306, S. C.

<sup>5</sup> S. C. 6 Bing. 308.

<sup>6</sup> See per Lord Mansfield in Rex v. Woodfall, 5 Barr. 2667.

payable on corn sold in bulk, is not specifically fraudulent ab initio, so as to be actionable, though the buyer knows the claim of toll; unless it is alleged and proved, that such buyer, at the time of purchasing, had an original intention to withhold the toll.<sup>1</sup>

But where the act is *in itself* unlawful, the proof of justification or excuse lies on the party charged with it, whether criminally or in an action; and if he fails in such proof, the law implies a criminal intent.<sup>2</sup>

Thus on an indictment for delivering loaves for the use and supply of children in the Military Asylum as good, which were in fact unwholesome and contained noxious ingredients, Lord Ellenborough laid it down as an universal principle, that when a party is charged with doing an act, the probable consequence of which may be highly injurious, his *intention* in so doing is an inference in law resulting from his doing the act.<sup>3</sup>

The same thing has been expressed by Mr. Justice Bayley as follows; "Where a particular consequence necessarily results from any act, the party doing it is to be considered as *prima facie* intending the necessary consequence of that act."<sup>4</sup> Thus all the judges of England held that the setting fire to a house by a person not the occupier, is sufficient proof of intending to injure him.<sup>5</sup>

Further, they held a bare disposing of forged bank notes to be sufficient proof of an averment that the offender intended to defraud the bank whose notes were imitated; though the jury found that the intent of defrauding that bank in particular did not enter into the prisoner's contemplation.<sup>6</sup> Indeed, were not a criminal intent thus presumed in cases of the above kind, the maxim under consideration might be thought to justify any unlawful and dangerous act done wilfully, deliberately, or wantonly, by which the life or property of another is destroyed or injured, in case the prosecutor should be un-

<sup>1</sup> Per Lord Ellenborough in *Tewkesbury (Bailiffs, &c.) v. Diston*, 6 East, 460; *Blakey v. Dinsdale*, Cowp. 664.

<sup>2</sup> Per Lord Mansfield in *Rex v. Woodfall*, 5 Burr. 2667.

<sup>3</sup> *Rex v. Dixon*, 3 M. & Sel. 11.

<sup>4</sup> See *Rex v. Harvey*, 2 B. & Cr. 261.

<sup>5</sup> *Rex v. Farrington*, Mich. 1811; *ibid.* and 2 Russ. C. & M. 1675, 2d edit.

*Rex v. Mazagora*, E. 1815; Bayley on Bills, 443; 2 B. & Cr. 261.

able to show particular malice prompting the injury to the individual.<sup>1</sup>

Again, if a man, knowing people to be passing along a street, shoots or throws a stone, &c., likely to create danger, over it, with intent to do hurt, to *some* people, and *one* is thereby killed, it is murder on account of the previous malice, though the stone, &c. was not directed against any individual in particular; for it is no excuse that the party was bent on general mischief. Whereas if it be proved by the evidence that the act was committed, not with intent to do mischief, general or particular, but from incaution, it is only manslaughter.<sup>2</sup>

However, though every man must be taken to be answerable for the *necessary* consequences of his own wrongful acts, yet he is not liable for the act of another done of his own accord, though in consequence of the original wrongful act. Thus the repetition by B. to D. of a slanderous imputation uttered by A. to B. respecting C., is a voluntary act of the free agent B. over whom A. has no control; and therefore A. is not answerable for any damage sustained by C. in immediate consequence of the slander thus expressed respecting him by B. to D., though A. originally gave it circulation by uttering it to B.<sup>3</sup>

Having thus traced the law respecting injurious intention when developed by acts of a like kind, we will proceed to illustrate the maxims under which a criminal intention, attempt, or endeavour is subjected to legal control, or exempted from it.

First of the maxim "*Voluntas reputatur*" (*reputabitur sive reputabatur*) "*pro facto.*"<sup>4</sup> Thus rendered: "The will (or the imagining, compassing, or intention) shall be taken for the deed." Expanded thus by Bracton, "*Spectatur voluntas, et non exitus; et nihil interest utrum quis occidat, aut causam mortis præbeat.*"

By the ancient law, the compassing, imagining, or intending any felony, for instance, homicide, if manifested by any

<sup>1</sup> See *Rex v. Harvey*, 2 B. & Cr. 268.

<sup>2</sup> 1 East's P. C. 231, chap. v. s. 18, citing 1 Hale, 475.

<sup>3</sup> *Ward v. Weeks*, 7 Bing. 215.

<sup>4</sup> 3 Inst. 5, 69.

“open deed or plain fact,” in modern parlance *overt act*, was punished in the same manner as the offence when completed. And the guilty intent which was thus punishable, being a mere act of the mind, which, taken per se, defied judicial cognizance, it was necessary to demonstrate its existence by establishing some overt act.<sup>1</sup> But this rule is treated by Coke as exploded before his time,<sup>2</sup> except in high treason, in which it is retained by the positive enactment of stat. 25 Ed. III. st. 5, c. 2,<sup>3</sup> and in misdemeanors. In these cases it still prevails in its full extent, but in felonies is rejected, except enforced by special provision of the legislature. In no case will the guilty intent be presumed, till disclosed by some deliberate and, as it seems, *illegal*<sup>4</sup> act, which, as the cognate result of the “mischievous imagining” of a crime, tends to its execution. Thus the assaulting a man with weapons and leaving him for dead, was anciently punished as murder though the injured person recovered,<sup>5</sup> and is now made felony by express statute, 9 Geo. IV. c. 31.

Even in high treason, with some disgraceful exceptions in the reign of Edward the Fourth, familiar to all English readers, nothing so ambiguous and sudden as bare oral expression was held to constitute an overt act amounting to the “voluntas” of the maxim, the true course of punishment being by indictment for sedition; and though many statutes in the Tudor reigns expressly enacted, that compassing the king’s death by bare words should be high treason, they are all repealed or expired.<sup>6</sup>

As the “compassing,” purpose, or intent of the heart is the treason, so it may be demonstrated by the act of deliberately setting down in writing words which plainly relate to some act or design amounting to it.<sup>7</sup> For *scribere est agere*,<sup>8</sup> and a

<sup>1</sup> 3 Inst. 5; 4 Bla. C. 79.

<sup>2</sup> 3 Inst. 69. See Fortescue de Laudibus, c. 46, p. 173, Amos’s edition.

<sup>3</sup> Foster, 193, 194.

<sup>4</sup> Per Lord Abinger in Reg. v. Meredith, 8 C. & P. 589. An attempt to commit a misdemeanor is not indictable unless there be some illegal act done: and the taking any step towards committing a misdemeanor, unless by an illegal act, is not sufficient.

<sup>5</sup> Foster, 193, 194.

<sup>6</sup> 3 Inst. 14.

<sup>7</sup> 3 Inst. 14; Foster, 200—207; 4 Bla. C. 80, 81.

<sup>8</sup> Williams’s case, 2 Roll. R. 89. See Sidney’s case, 2 Burnet’s Hist. Own Times, 237; 1 Hawk. B. I. ch. 17, s. 32.

bare consulting with others how to kill the sovereign is sufficient, though nothing else be done.<sup>1</sup> But if written matter of a nature merely speculative is kept in a box in the writer's study, without apparent intent of making public use of it, as in the case of a MS. sermon never preached, &c., the better opinion is that such act of writing or keeping is *not* overt, so as to visit the intention with which it was written with the consequences of treason;<sup>2</sup> and though the bare publication of such a writing would without more have amounted to treason in earlier periods of our history,<sup>3</sup> it would probably be now held necessary to show its connexion with some act or design of a treasonable character.<sup>4</sup>

As to the application of this maxim in *misdemeanors*, the law is thus stated in a modern work successively edited by Serjeant Talfourd and Mr. Tyrwhitt: "Although a bare criminal intent is not in itself indictable, if merely expressed in words or gestures, or otherwise, without further proceeding to the crime to which it points, yet, if it is accompanied by any act being a proximate step and attempt towards the accomplishment of the crime, that act, though in itself out of the reach of indictment, will not be judged of alone, but as coupled with the criminal intent which prompted it, and is therefore punishable on indictment.<sup>5</sup>"

One Bacon was indicted for that he, intending to murder Sir Harbottle Grimston, Master of the Rolls, had communication with a person named, and offered him 100*l.* to do it. It would seem from the report, that the Master of the Rolls having made a decree against Bacon, he offered 100*l.* to J. S. to kill Sir H. G., and said if J. S. would not do it he would do it himself. It was argued that the intent only was not indictable, but the Court said "*Anciently the will was taken for the deed* in matters of felony, and though it is not so now, yet it is an offence and finable. A conviction followed, with a fine

<sup>1</sup> 1 East's P. C. 58.

<sup>2</sup> Ibid.; 2 Roll. B. 89; 1 Hawk. B. L. ch. 17, s. 32, pp. 56, 57.

<sup>3</sup> 1 Hale's P. C. 118; 1 Hawk. P. C. 38.

<sup>4</sup> See 4 Bla. C. 81.

<sup>5</sup> See Dickenson's Sessions, 5th edit., 287, citing *Rex v. Scofield*, Cald. 400; S. C. East's Pleas of the Crown, 1030; also Fuller's case, id. 92; 1 Bos. & Pull. 180, S. C.

of 1,000 marks, three months' imprisonment and finding sureties for good behaviour for life.<sup>1</sup>

This maxim of taking the will for the deed had been long disused in felonies even in Lord Coke's time; for in stating that an assault with intent to rob, but without taking any money or goods, is not felony (since made so by 7 & 8 Geo. 4, c. 29, s. 6), he adds that "such opinions as seem contrary were founded on the ancient rule '*voluntas reputatur pro facto*.'"<sup>2</sup>

The doctrine laid down by Lord Mansfield in *Rex v. Scofield*,<sup>3</sup> comprises all the principles of the former decisions: viz., that so long as an act rests in bare intention, it is not punishable by the laws; but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done, and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.<sup>4</sup>

The misdemeanor of *conspiracy* affords another illustration of the above maxim. Though this is one of the most comprehensive yet least defined heads of criminal law, it may be laid down as a general position that a confederacy to effect a lawful purpose by unlawful means, is as punishable as if a confederacy were entered into to effect an unlawful purpose by any means whatever.<sup>5</sup>

The *conspiring* is the gist of the offence;<sup>6</sup> but the question of offence or not seems to depend on whether the object of concert is illegal, or if it be legal, whether the means proposed to bring it about are the contrary. It is not quite clear that the illegality of the designed result will always render the confederacy indictable, at least where there is a civil remedy by action, as in a conspiracy to kill hares in a preserve;<sup>7</sup> but it seems that it will.<sup>8</sup> Proof of words used will support a

<sup>1</sup> Bacon's case, 1 Lev. 146; 1 Keb. 809; 1 Sid. 230, S. C.; cited 2 East, R. 15.

<sup>2</sup> 3 Inst. 5, 69.

<sup>3</sup> Cald. 397; East's P. C. 1028.

<sup>4</sup> Per Lawrence, J., in *Rex v. Higgins*, 2 East's R. 21.

<sup>5</sup> See 3 Inst. 143; and per Lord Denman, in *Rex v. Seward*, 1 Ad. & Ell. 711.

<sup>6</sup> See per Bayley, J., in *Rex v. Gill and another*, 2 Bar. & Ald. 205; *Rex v. Bryan, Strange*, 866.

<sup>7</sup> See *Rex v. Turner and others*, 13 East, 228; cited by Taunton, J., in *Rex v. Seward and another*, 1 Ad. & Ell. 711.

<sup>8</sup> Dickenson's Sessions, 5th ed. 336.



charge of conspiracy; they being per se an overt act sufficient to prove the conspiring;<sup>1</sup> and it is not necessary to show<sup>10</sup> that any overt acts beyond such a conspiring were taken toward completing its object.<sup>2</sup>

The above principles are further supported by the following maxims:—

“Quando aliquid prohibetur, prohibetur et id per quod devenitur (sometimes pervenitur) ad illud.”<sup>3</sup>

Thus translated, “The prohibition of a thing includes every other thing by which that which is prohibited is arrived at.”

“Non officit affectus, nisi sequatur effectus.”<sup>4</sup>

Thus rendered, “The bent or disposition of mind works no hindrance unless some effect of it follows.”

“Sed in atrocioribus delictis, affectus punitur, licet non sequatur effectus.”<sup>5</sup>

Thus translated, “But in the more aggravated crimes [*e.g.* high treason, rebellion, &c.] the disposition is punished, though its effects do not follow.”

Coke cites the two first of these maxims as illustrating the position that on a charge of conspiracy, viz., a misdemeanor, the law, before the accomplishment of the unlawful object sought to be obtained by the confederacy, punishes the conspiring, in order to prevent the attaining of the unlawful object.<sup>6</sup> Thus, a confederacy to indict or acquit a party, carried into effect by taking out a warrant and apprehending him, or by giving bonds, promises, &c. between the parties conspiring, is punishable by law, though the design fails and nothing is accomplished, *e.g.* from the grand jury throwing out the bill, &c.<sup>7</sup>

Every oppression against law by colour of usurped authority of law, *e.g.* execution, &c. not obtained per legale iudicium parium, aut per legem terræ, is an oppression by colour of justice, and a kind of destruction<sup>8</sup> which is prohi-

<sup>1</sup> *Rex v. Kinnersley et al.*, Strange, 193; *Rex v. Bryan*, id. 868.

<sup>2</sup> *Rex v. Gill*, ubi supra; *Dick. Sess.* 5th ed. 337.

<sup>3</sup> 2 Inst. 48; 3 Inst. 158; 9 Co. 57.

<sup>4</sup> *Bagge's case*, 11 Co. 98 (b); 1 Roll. R. 226, S. C.

<sup>5</sup> 2 Roll. R. 89; 9 Co. 57.

<sup>6</sup> See 9 Co. 56, 57.

<sup>7</sup> *Ibid*; and see *Frazer's note A*, in new edit. of *Coke's Rep.* vol. 5, 101.

<sup>8</sup> *Mag. Ch. ch.* 29.

bited.<sup>1</sup> For “*Quando aliquid prohibetur, prohibetur et id per quod devenitur ad illud.*”

So Lord Coke, after treating of single combats or affrays, says, if any subject challenge another to fight, this is also an offence before any combat be performed, and is punishable by law. He cites the same maxim.<sup>2</sup>

Every persuading, or solicitation of another, by whatever means attempted, is an “act done;”<sup>3</sup> and if it be done with a criminal intent, viz. of committing an indictable offence, is per se indictable, whether any overt act is committed in consequence of the solicitation or not, or whether, if there is, the offence thus prompted be completed or not.<sup>4</sup>

Again, “*Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*”<sup>5</sup>

Thus translated, “What the law prohibits from being done by direct means, is equally unlawful if done by indirect means.”

This rule is quoted by Mr. Justice Burrough in *Deane v. Clayton*,<sup>6</sup> to support his opinion, that as the defendant could not justify killing a dog directly for trespassing on his land, so he could not justify the doing so indirectly; *e. g.* by the dog’s running on a dog-spike set in his cover.

In *Ilott v. Wilkes*,<sup>7</sup> an action for injuries sustained by the plaintiff, while trespassing on the defendant’s land, from a spring-gun set there of which the plaintiff had been informed, Holroyd, J., said that the express notice that the spring-guns were placed on the premises into which the plaintiff wilfully entered prevented this maxim from applying, as it made the act of firing the gun *his own* act.

<sup>1</sup> 2 Inst. 48; *The Marshalsey case*, 10 Co. 74; *Articuli sup. Car.* ch. 3.

<sup>2</sup> 3 Inst. 158. See *Rex v. Phillips*, 6 East, 463.

<sup>3</sup> Per Le Blanc, J., *Rex v. Higgins*, 2 East, R. 23.

<sup>4</sup> *Rex v. Scofield*, Cald. 400; *S. C.* East’s P. C. 1030; *Rex v. Higgins*, 2 East, R. 5, 19; *Rex v. Vaughan*, 4 Burr. 2494; *Rex v. Plympton*, 2 Lord Raym. 1377; *Young’s case*, cited 2 East, R. 14, 16. See *Conatus*, &c. next page.

<sup>5</sup> *Wingate’s Max.* 680, 618.

<sup>6</sup> 7 Taunt. 507. Though in *Deane v. Clayton* the plaintiff might have had notice from the defendant’s notice boards that dog-spikes were set in the wood, it was not found by special verdict that he had. *Burrough*, J. treated the case as if he had not, declaring, however, the fact of notice or not was immaterial to his judgment, and that is the holding of the Court in *Jordin v. Crump*, *infra*. See *Vere v. Lord Cawdor*, 11 East, 568, as cited by Dallas, J., 7 Taunt. 520.

<sup>7</sup> 3 Bar. & Ald. 314, 316.

It is now held, that a man may set dog-spears on land in his own possession; and that, whether the owner of a dog which leaves his master on a footpath and runs on a dog-spear in a wood knows of such instrument being set there or not, he has no remedy for the injury to the dog, for he should have kept him on the path.<sup>1</sup>

If one who is enfeoffed on condition of never enfeoffing a party named as J. S., enfeoffs J. N. on purpose that he shall enfeoff J. S., this is a breach of the condition under the above maxim.<sup>2</sup>

The last maxim to be here noticed as applicable to this subject is this:—

“Conatus quid sit, non definitur in jure.”

Thus rendered, “The law does not define or contemplate what an ‘endeavouring,’ ‘going about,’ or ‘attempt is.’”<sup>3</sup>

The application of this important principle to cases of forfeiture, disfranchisement, and the forms of pleading, shall be stated in the language of Coke, taken from *Sir Anthony Mildmay's* case,<sup>4</sup> where on settling some manors, &c. in tail, a proviso was introduced in the gift, that if the donee, Mildmay, should enter into any communication, promise or covenant soever, or should “advisedly attempt, procure, go about, or assent to or for any act or thing for or touching any bargain, sale, discontinuance, alienation, conveyance or assurance to be had of any of the said manors, &c.,” that then immediately after such time of such procuring, attempting or going about in form aforesaid, the estate tail thereon should cease as if the donee were dead. And the Court resolved<sup>5</sup> that these words “attempt,” “go about,” or “enter into communication,” &c. were words uncertain and void in law: and “God forbid that men’s inheritances and estates should depend on such uncertainty, for it is true ‘Quod misera est servitus ubi jus est vagum:’ and ‘Quod non definitur in jure quid sit conatus,’ nor what is a going about or communication; and therefore the maxim of law decided the point, ‘Non officit

<sup>1</sup> *Jordin v. Crump*, 8 M. & W. 782, (Tr. 1841.)

<sup>2</sup> Co. Litt. 223.

<sup>3</sup> 6 Co. 42; *Sell v. Tracey*, 2 Bulstr. 277.

<sup>4</sup> 6 Co. 42 a.

<sup>5</sup> 6 Co. 42 a, and 42 b; see also 11 Co. 98 b.

conatus nisi sequatur effectus,' and the law rejects conations, goings about, as things uncertain which cannot be put in issue. For if any party bound with such a perpetuity went to consult a counsel whether he might alien part to pay debts or advance his younger children, is that a breach of the proviso?" Coke then quaintly says, that the proviso not "to go about" is "bolting irons on the legs," and that not "to enter into communication" is to "seal up the lips and deprive of the use of the tongue."

Again, in Mary Partington's case,<sup>1</sup> another case of *forfeiture*, land was devised in tail with a proviso that if any of the devisees "should *conclude* and *agree to* or for the doing any act" &c. whereby the lands entailed &c. should be discontinued or aliened, she should immediately after such "conclusion and agreement" &c. lose and forfeit all estate and benefit which she might claim under the will. The devisee "concluded and agreed" to suffer a recovery of the property, and it was suffered accordingly to the use of the devisee and her heirs. The next in remainder claimed the estate as forfeited, and brought trespass, but was defeated; for as the recovery itself being by tenant in tail could not be prohibited by any condition or limitation, a fortiori the conclusion or agreement to suffer it could not. Coke, in speaking of Edward the First's time, adds that "this imagination of 'going about' or concluding' was not then nor long time after hatched."<sup>2</sup>

Bagg's case<sup>3</sup> was a question of disfranchisement, viz. whether if a burgess intends or endeavours of himself, or conspires with others, to do any thing against the duty or trust of his freedom, and to the prejudice of the public good of the borough, *but doth not execute it*, he is to be disfranchised or only punished (as by finding sureties, &c.): and it was held that he cannot be disfranchised, "for non officit conatus nisi sequatur effectus," and "non officit affectus nisi sequatur effectus." Coke goes on to state the reason of the judgment to be, that a freeman of a borough has a freehold in his freedom for life, and with others an inheritance in the corporation lands, &c., and "therefore the matter which shall be a cause of his dis-

<sup>1</sup> 10 Rep. 35 a.

<sup>2</sup> 10 Rep. 38 b.

<sup>3</sup> 11 Coke, 98 b; 1 Roll. Rep. 226, S. C.

franchisement ought to be an act or deed and not a *conation* or an *endeavor*," which he may repent of before the execution of it, and from whence no prejudice ensues.<sup>1</sup>

Again, in informations in quo warranto for usurping any office, which are in the nature of civil actions, the party sued is not liable to judgment of fine for the usurpation, or of ouster, unless "he has done the act which implies the claim," (*e.g.* held a court which he claimed to hold),<sup>2</sup> or in other words, unless there has been user as well as claim.<sup>3</sup> In pleading a treaty for a marriage, or a slander of title, it does not suffice to aver that the party pleading *intended* and *endeavoured* to obtain a woman in marriage, or to sell an estate; but a specific colloquium or communication respecting such marriage or sale, and then the hindrance by the plaintiff in accomplishing that object, should first be alleged by the defendant: for intention is a mere act of the mind, and "conatus quid sit non definitur in jure."<sup>4</sup>

But this last maxim does not give impunity to attempts at such acts as tend to the prejudice of the community,<sup>5</sup> viz. to commit offences punishable by law. For every *attempt* or *endeavour* to commit a felony or misdemeanor, whether punishable as such at common law or by statute, is *per se* indictable.<sup>6</sup> Some instances are subjoined: an attempt to bribe a public officer to give an office or to vote in a particular way;<sup>7</sup> or to bribe a juror;<sup>8</sup> or to prevail on a party to commit or suborn perjury;<sup>9</sup> or to incite him to fight a duel;<sup>10</sup> or to pro-

<sup>1</sup> 11 Co. 98 b; 6 Modern, 99.

<sup>2</sup> Rex v. Williams, 1 Bla. R. 94; 1 Bur. 103, S. C.

<sup>3</sup> Rex v. Ponsonby, Sayer's Rep. 245; Bull. N. P. 7th edit. 211 a; and see Reg. v. Pepper, 7 Ad. & E. 745; Rex v. Williams, *ubi supra*.

<sup>4</sup> Sell v. Facy, 2 Bulstr. 276; 1 Roll. R. 29, S. C.

<sup>5</sup> Per Lawrence, J., Rex v. Higgins, 2 East's R. 21.

<sup>6</sup> See Rex v. Roderick, 7 C. & P. 795; Rex v. Meredith, 8 id. 589 (Lord Abinger), and per Le Blanc, J. in Rex v. Cartwright, R. & Ry. 108, n.; Rex v. Butter, 6 C. & P. 363; Rex v. Harris, id. 129, Patteson, J.; Reg. v. Martin, 9 C. & P. 215, Patteson, J.; S. C. id. 213, Alderson and Law.

<sup>7</sup> Rex v. Vaughan, 4 Burr. 2494; Rex v. Plympton, 2 Ld. Raym. 1377.

<sup>8</sup> Young's case, cited in Rex v. Higgins, 2 East's R. 14, 16.

<sup>9</sup> Rex v. Edwards, cited in Scofield's case, Cald. 400; and per Lord Kenyon, Rex v. Higgins, 2 East's R. 17.

<sup>10</sup> Rex v. Rice, 3 East, 581.

voke him to send a challenge;<sup>1</sup> and every solicitation of another to commit an offence,<sup>2</sup> whether acted on or not. An attempt or preparation by a man to set fire to his own house in a town by putting a lighted candle under the staircase, though the fire is never kindled.<sup>3</sup> And the like of an attempt to stifle or prevent the giving evidence by a party on his subpoena.<sup>4</sup>

Where acts of parliament specifically attach punishments to particular attempts or endeavours to commit particular acts therein specified, whether *mala prohibita*, or *mala in se*, (*e.g.* endeavouring to seduce soldiers, or to incite them to mutiny,)<sup>5</sup> it is of course unnecessary to consider the effect of the maxim unless the expression of the act be deficient for its purposes.

<sup>1</sup> *Rex v. Phillips*, 6 East, 463.

<sup>2</sup> Per Lord Mansfield in *Rex v. Scofield*, Cald. 400; East's P. C. 1030; *Rex v. Higgins*, 2 East, 17. See 3 G. 4, c. 38, s. 3.

<sup>3</sup> *Rex v. Scofield*, Cald. 400; *Rex v. Holmes*, East's P. C. 1023.

<sup>4</sup> 1 Hawk. P. C. c. 21, cited in *Rex v. Phillips*, 6 East, 464.

<sup>5</sup> Trotter's case, 1 B. & P. 180; S. C. 1 East's P. C. 92.

*R. P. T.*

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#### ART. IX.—THE CASE OF THE CREOLE.

It is not often that we venture upon the consideration of any matter appertaining to politics, but the case of *The Creole*, which has recently been the subject of discussion between the government of England and the United States, is one so peculiarly legal in its nature, that we may make some remarks upon it without in the least degree infringing our general rule. Indeed, the subject has been expressly presented for the notice of jurists, by the elaborate official Note despatched from Washington to the minister of the United States at St. James's, and believed to be the production of Mr. Webster. In our remarks upon this note we shall assume this belief to be well founded, and the fallacies, with which the note is filled, will then appear but the more striking on account of the well established fame of its learned author.

It will be at least fair to take the facts from the very language of the note itself. They are thus stated: "It ap-

pears that the brig *Creole* of Richmond, Virginia, Inso master, bound to New Orleans, sailed from Hampton Roads on the 27th of October, with a cargo of merchandize, principally tobacco and slaves, (about 135 in number); that on the evening of the 7th of November some of the slaves rose upon the crew of the vessel, murdered a passenger named Hewell who owned some of the negroes, wounded the captain dangerously, and the first mate and two of the crew severely; that the slaves soon obtained complete possession of the brig, which, under their direction, was taken into the Port of Nassau, in the Island of New Providence, where it arrived on the morning of the 9th of the same month; that at the request of the American Consul in that place, the governor ordered a guard on board the brig, to prevent the escape of the mutineers, and with a view to an investigation of the circumstances of the case; that an investigation accordingly took place before two British magistrates, and that an examination also took place by the consul; that on the report of the magistrates, nineteen of the slaves were imprisoned by the local authorities, as having been concerned in the mutiny and murder, and their surrender to the consul, for the purpose of being sent to the United States for trial for these crimes, was refused, on the ground that the governor first wished to communicate with the government of England on the subject; that through the interference of the Colonial authorities, and even before the military guard was removed, the greater number of the remaining slaves was liberated, and encouraged to go beyond the power of the master of the vessel, or the American consul, by proceedings which neither of them could control. This is the substance of the case as stated in two protests, one made at Nassau and one at New Orleans, and the consul's letters, together with sundry depositions taken by him."

Such is the statement of a case, which, drawn from the sources therein indicated, cannot be supposed to be very favourable to the negroes. Indeed the note starts with an assumption which, if well founded, might go far to settle the whole question. We shall see with what little justice this assumption is made. The act performed by the negroes is designated at once as the double crime of mutiny and murder. Here is the first great assumption: it is the foundation of all the rest, and



if once removed the whole argument of the note falls to the ground. In the first place, what is mutiny? It is the unlawful disobedience of the subjects of any state to the military or naval authorities lawfully placed over them. It is considered as a species of treason against the allegiance which every subject owes to the state to which he belongs, and is therefore punishable with great severity. Does the act of self-emancipation achieved by these negroes fall within the description? Did they owe allegiance to the United States? Have they violated the duty which, for benefits received and protection given, the law was entitled to demand from them? Is it possible to give any but negative answers to these questions? On the other hand, can it be said that the Americans had any lawful possession of them? In the slave-holding states it would have been a lawful possession;<sup>1</sup> in others it would not,<sup>2</sup> at least with regard to foreign slaves. But assuming, for the purpose of this argument, that it would have been a lawful possession in all the states of the Union, and would have been enforced by the tribunals of each, that fact alone does not make the possession so entirely lawful, and the property in the negroes so completely and legally vested according to the eternally recognized principles of natural law, as to render the self-emancipation of these negroes an act of mutiny on their part. In no respect whatever does their conduct even approach to the crime of mutiny. The law made by the Americans, declaring themselves entitled to have a property in the persons of the natives of another state, being a law opposed to all the settled and recognized principles of the law of nature and nations, must manifestly be an exceptional law, depending solely for its observance on the power of those who made it. Whenever therefore the power of force is successfully turned against the makers of the law, the law itself comes to an end. The objects of such an unnatural law are entitled at all times and under all circumstances to put an end to its operation. The moment they attain the power, they may exercise this right. The right itself is inherent in them; it may be subdued, but it cannot be destroyed, by superior force; it has an eternal existence, for it is in accordance with the eternal principles of

<sup>1</sup> Story, *Conflict of Laws*, 2nd edit. c. iv. s. 96.

<sup>2</sup> *Id.* ib.

nature and justice. The fact that the violation of the natural right to personal freedom was in this instance exercised against negroes can make no difference in the matter. The same right exists in the Americans, and no greater right, to declare that all English or French prisoners taken by them in war (as well as all negroes, no matter how obtained) shall be reduced to a state of slavery and sold and transferred in every way as property. If they had thus declared and acted on the declaration, is there any one Englishman or Frenchman who would have considered himself, or have been considered by others, in the least degree precluded from the right to redeem himself by force of arms from this state of slavery, whenever the opportunity offered itself for effecting this object? If any French or English prisoners of war so doomed to slavery, should, while on board an American ship, rise on their captors and master them, would not France and England rejoice in the success of their citizens? Would any nation in the world brand them as mutineers or murderers? And should the men, who had thus captured their captors, sail into a port of Spain (Spain being at the moment at peace with all the nations), and should the American government demand their surrender, would not the compliance by the Spanish government with such a demand be a just cause of complaint, if not of war, on the part of England or France? The same rule is applicable to negroes as to Englishmen and Frenchmen, and the circumstance that there is no native African government strong enough to demand satisfaction from the Americans, nor to punish them for the enslaving of Africans, makes no difference in the principle, though it may add to the guilt of oppression the shame of having practised it solely because it could be practised with impunity. In this circumstance lies the whole secret of negro slavery. But it is not necessary to go to the length of supposing the Americans to make slaves of their prisoners of war. The rule in the case of simple prisoners of war would be the same. The note in one part says, that the English authorities had no right to examine into the circumstances under which the negroes were on board *The Creole*, for they might have been there as prisoners of war. The justification of the negroes in freeing themselves, and of the English authorities in not restoring

them to captivity, is alike established by the supposition that the negroes were prisoners of war. The assertion to the contrary is another of the fallacies of the note ; and yet it is put forward as an argument of unanswerable truth. The answer to it is complete. War is from beginning to end a question of force. A truce suspends this state of things as to all the subjects of each of the belligerent parties. The "parole" of any one prisoner suspends it in his individual case. Now, suppose an English or French ship sailing with a body of American prisoners of war on board, or an American ship sailing with a body of French or English prisoners—suppose no truce to have been made and no "parole" to have been given—would not every one of the prisoners in any of the ships have a perfect right to effect his freedom, and would his doing so be an act of mutiny? If it would not with English, French, or Americans, it could not be so with negroes. If not, then no ship of another nation would on meeting with any of these vessels be entitled to interfere to restore the original condition of captors and captured. Nay, if during the progress of the contest a ship of another nation was to approach the ship where the contest was raging, any assistance whatever rendered by it to either of the parties would be an infraction of its peaceful relations with the nation of the other party. The same rule would apply, if the captors, driven by stress of weather, should be about to enter the port of a nation at peace with their own country and with the country of the captives, and while within the sea line of this neutral nation the prisoners should rise on their captors. The authorities of the neutral nation would in such a case have nothing to do but to look on without interfering in favour of either party, for any such interference would *ipso facto* convert the friendly and neutral nation into a belligerent, it would be a violation of neutrality, an interference in the war itself, and could not be justified. If this is the case while the contest is in doubt, it must equally be so when the contest is over. If, therefore, when the prisoners had succeeded in making themselves masters of the ship, they sailed with it into the port, the authorities there could not justify any interference to restore them to their state of prisoners. The act of self-redemption by the negroes is clearly therefore one that cannot be brought under the description of mutiny. The

negroes had a right to emancipate themselves from slavery, as the prisoners of war in the case supposed would have a right to redeem themselves from captivity.

Then comes the question whether the negroes were bound and restricted to the use of particular means in order to effect this object. This question is raised by the second assumption in the note, that the negroes had been guilty of murder. The answer to this question is likewise very simple. If the Americans were not entitled to hold the negroes in slavery—if there was no law which bound the negroes to submit to such a state of things, it is clear that the Americans and the negroes were in a state of war with each other, a state in which their relations were to be decided by force, and must be maintained by force. But if in a state of war, then it is clear that the means of obtaining or maintaining superiority are entirely in the discretion of either party. They are such as opportunity may suggest and afford, and no other. In such a case, the appeal to arms being the ultimate arbiter of the relative conditions of the parties, killing is clearly not murder. For murder is defined by all legal authorities to be a killing without lawful excuse. Now the existence of the state of war is by all admitted as furnishing the excuse, and to kill in war is not to murder. Supposing therefore that the British authorities had interfered and had examined into the case, they must have declared that as slavery is a state neither enforced by the general law of nations nor by the British law, the case must be treated as one of a contest between two parties equally entitled to contend for the mastery, and therefore one in which, by the laws of nations, they were not at liberty to assist either party. Then the very thing which has occurred would have happened. The authorities would have declined to interfere, the negroes would have left the ship, and the Americans would have resumed possession of it. The note seems to suppose that such would have been the case had there been any inquiry, and therefore it denies the right of the British authorities to examine into the matter. But with a singular infelicity of argument, it assumes that absence of inquiry and implicit credence to be given to one party are identical, and that the representations of the Americans as to the case being one of mutiny and murder, were at once to be believed, and those of the negroes to be unheard or disre-

garded. This assumption must proceed on the ground of the difference of the two parties as to the colour of the skin. No other is stated. And indeed any other would be fatal to the assumption, since as far as the position of the parties at the moment of entering the Port of Nassau was concerned, the statement of the Americans seemed to be contrary to the fact; for the negroes were the masters of the vessel, and the Americans were the prisoners. The note itself says, "The vessel was carried against the master's will out of its course into the port of a friendly power." The negroes had overpowered the Americans, were in possession of the ship, and had of their own free will navigated the ship into the British port. If, therefore, the British authorities were not entitled to make any inquiry, but to take things as they found them, the result would certainly have been not more favourable to the Americans than it has been. But the denial of the right of the British authorities to inquire into the affair is only made *sub modo*, that is to say, there is to be an inquiry to this effect "what do the Americans say?" but there is to be no inquiry "what do the negroes say?" and then on the representations of the Americans, that the negroes are their property, their slaves, and have been guilty of mutiny and murder, the negroes, without being allowed to give any answer or explanation, are to be forthwith consigned to captivity by the aid and interference of the British authorities. This is rather a strong proposition. But perhaps we have mistaken the note: for in one part it expresses a doubt of the right of the British authorities to interfere at all. The sentence is somewhat obscure and uncertain, but such seems on the whole to be its meaning. "If indeed, without unfriendly interference and notwithstanding the fulfilment of all their duties of comity and assistance by these authorities, the master of the vessel could not retain the prisoners nor prevent their escape, then *it would be a different question altogether whether resort could be had to the British tribunals or the power of the government in any of its branches, to compel their apprehension and restoration.*" This sentence surrenders the whole claim: the appeal was made to "the British tribunals and the power of the government" to compel the apprehension of the negroes and their restoration to a state of slavery. It is true, as the

note asserts in the next sentence, that the negroes were still on board the American vessel, but they were there, so far as the American captain and his crew were concerned, as masters, not as slaves, and the demand was to have them secured as slaves. The mere entry of the ship into the British port had not converted the negroes who had brought it thither into the passive slaves of the Americans, who had, confessedly against their will, been brought thither. To restore things to the state in which they were at the commencement of the voyage, the assistance of the British authorities was necessary. Yet it is almost admitted by the Note itself that that assistance could not, for such a purpose, be asked.

In this way, from beginning to end, the Note is full of assumption and contradictions. It is this which makes it the more necessary to remember who is the author of the Note. His inability to make out a case of complaint against the British authorities is decisive. He is not a mere popular orator, with volubility to astonish the crowd, but without those gifts of sense and knowledge which can alone win the esteem of better-informed men. He is the reverse of all this. He is a man of great learning and ability, a distinguished lawyer, a master of argument; one who has won his way with well-deserved success to the higher honours of his country—honours the highest of which it is likely he will one day reach. The Note is, in truth, the Note of the Southern Slaveholders; it is marked by their inconsequences and illogical wilfulness of purpose, and the untenable nature of the propositions it contains is shown by the very unconvincing mode in which this able lawyer and writer has alone been able to put them forward.

When this question was debated in the House of Lords, five distinguished lawyers, viz. Lords Brougham, Denman, Campbell, Cottenham, and Lyndhurst, expressed the clearest and most settled conviction that the British authorities at Nassau had no legal power nor means to arrest or detain the negroes. Lord Brougham added that Lords Wynford and Abinger entertained the same opinion. In that view of the matter, therefore, the Americans, according to the clearest legal doctrines, have no ground of complaint. If the laws of a country have not foreseen and provided for an event, the persons

who are sufferers by it can have no legal ground for claiming compensation. But we agree with Lord Denman, that should the omission be now attempted to be provided for, it must not include cases where the interference of British authorities is to be asked for in order to continue the curse of slavery.

Englishmen will not consent, as his lordship said, "to act as policemen or jailors to enforce the powers of the master over the slave; they would rather rejoice that 200 individuals who had been reduced to a state of slavery had *restored themselves to liberty*." In these last words his lordship has described with legal accuracy the conduct of the negroes in *The Creole*. That the British authorities were not entitled (nor indeed had the power) to interfere to make the negroes return to a state of slavery, is plain. The law of England, which rejects slavery, reigns supreme in English colonies, and within the limits of the English sovereignty English law is to be preferred and obeyed, not only before, but against all other laws. Such is the consequence of the existence of sovereign authority—a doctrine maintained by Mr. Justice Story in sections 18, 19, 22, 23, 33, and 37 of his great work on *The Conflict of Laws*, where he grounds his assertion on the declared opinions of foreign and American jurists, and of the American Courts. On this broad principle, therefore, the conduct of the British authorities may be fully justified. But passing it by entirely, we shall find, if we proceed to the question of one state surrendering to another prisoners escaped from the first, that no such surrender can be claimed or made—no, not even if the escape takes place after trial and conviction, except under the terms of a treaty<sup>1</sup> adopted and enforced by the provisions of the legislature of the state making such treaty.<sup>2</sup> Though Mr. Chancellor Kent in one case acted on the opposite principle, yet his judgment has been in subsequent cases in the American Courts overruled in fact, if not in form, and the later decisions are described by Mr. Justice Story<sup>3</sup> as "indirectly confirmed by the opinion of the majority of the judges of the Supreme Court of the United States in a very recent

<sup>1</sup> "No sovereign state is bound, unless by special contract, to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country."—Wheaton's *International Law*, i. 160.

<sup>2</sup> *Conflict of Laws*, 2d edit. c. 16, s. 626.

<sup>3</sup> *Ibid.* c. 16, s. 628.



case of the deepest interest." It is therefore clear, that had the charge against the negroes, of mutiny and murder in *The Creole*, been true, the Americans, who have hitherto refused to renew the treaty of 1795 for the mutual surrender of inculpated persons, could not have demanded them, nor could the British government have surrendered them. But the case against the demand of the surrender of those who had taken no part in the alleged mutiny and murder is still stronger, for the American laws themselves, as far as the necessities of the Union permit, refuse to acknowledge the existence of any right to demand the surrender of escaped slaves. The passage in Mr. Justice Story's work on this subject is so decisive that we must quote it.<sup>4</sup> He says, "there is a uniformity of opinion among foreign jurists and foreign tribunals, in giving no effect to the state of slavery of a party, whatever it might have been in the country of his birth, or *of that in which he had been previously domiciled*," (this last expression exactly applies to the case of a negro slave in America), "unless it is also recognized by the laws of the country of his actual domicile, *and where he is found, and it is sought to be enforced*." Then, after referring to various foreign writers and foreign judgments to this effect, he thus concludes, "Independent of the provisions of the constitution of the United States for the protection of the rights of masters in regard to domestic fugitive slaves, there is no doubt that the same principle pervades the common law of the non-slaveholding states in America: that is to say, foreign slaves would no longer be deemed such after their removal thither."

Here we may stop. In no one respect, of principle, of practice, of comity of nations, of natural, national, or common or statute law, is the demand recently made in the Official Note justified. We are asked to do what the Americans, in common with all other nations, would refuse: we are required to be more favourable to slavery than the non-slaveholding states of the Union would be to the masters of "foreign slaves,"—to treat as mutineers and murderers men who have only in a state of warfare regained their liberty; and our government authorities are blamed for not doing all these things, though they possess no legal power to do them, and though

<sup>4</sup> Conflict of Laws, 2d edit. c. 4. s. 96.

the want of such legal power is one of the consequences of the conduct of the American government itself, in refusing to renew a treaty which once existed for the mutual surrender by the two governments of criminals found in their respective territories. This is a little too much. But as the claim was put forward with an appearance of legal authority, and the Official Note was manifestly drawn up with great care, and might have misled some persons into a belief that the demands in it and its reasoning were well founded, we felt it our duty to protest against the one and to answer the other. The authority of the greatest of American jurists has been complete for this purpose, and if the Americans are to be governed by legal reasoning and legal judgments, the opinions of their most distinguished law writer and the decisions of their Courts are fatal to their claims. The ground of refusal put forward by our government is sufficient; but in anticipation of future cases it is as well to show that, for higher reasons than those of mere want of previously prescribed legal forms, the demand if again made must be again refused.

By the most recent advices from the United States we learn that a Mr. Gidding, adopting the view above taken of the legal right of the negroes to emancipate themselves, introduced into the House of Representatives certain resolutions declaratory of that right, and of the absence of any ground of complaint against the British government. His motion was met not by argument but by violence. The rules of the House, as declared by the President, were tumultuously violated, and the men of the South vindicated their assertion to be of right the masters of slaves, by enforcing a slave-like obedience to their will in the national legislature itself. A formal vote of censure was passed on Mr. Gidding, without hearing him in his defence, and from the statements transmitted in the papers it would seem as if he may account himself lucky if he escapes with nothing more cutting than a vote of censure. With persons of this sort legal reasoning and authority are thrown away. But, happily, they have their due weight with the rest of the world, so that we have still hopes that our labours may be useful.

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ART. X.—NOTICES OF EARLY ENGLISH LAWYERS—*Continued.*

## GLANVILLE.

OF this venerable jurist, the most ancient writer on the common law of England, and probably the earliest author of any systematic treatise on the jurisprudence of any European country, since the dissolution of the Roman empire, we have, as might be expected, but scanty and uncertain notices.

As early as the 16th year of Henry II. (1171), we find him recorded by the name of Ranulphus de Glanvillâ, as “Fermour of the Honour of Earl Conan;” in the next year, 1172, as having the custody of that Honour, and the fair of Hoiland; in 1174, still in possession of the same Honour, and accounting for the capture and ransoms of prisoners, &c. taken in war.<sup>1</sup> In this latter year he is reported to have distinguished himself in a manner not much in accordance with his legal pursuits, namely, as the general who took prisoner William the Lion, King of Scots, at the battle of Alnwick. In 1175, he appears to have filled the office of sheriff of Yorkshire. In the following year he was appointed one of the justices itinerant, for the northern counties; in 1179, the same appointment was again bestowed upon him, he being, moreover, one of six whom the contemporary chronicler describes as justices specially appointed to inquire into the complaints of the people:—“*Isti sex sunt justiciæ in curiâ regis constituti, ad audiendum clamores populi.*” The next year, 1180, he was elevated to the office of chief justiciary of England. Hoveden mentions the appointment in terms which seem to imply that his celebrated treatise had then been composed:—“*Henricus Rex Angliæ pater constituit Ranulphum de Glanvilla summum justiciarium totius Angliæ, cujus sapientiâ conditæ sunt leges subscriptæ, quas Anglicanas vocamus.*” The authority of the chief justiciary was at that period of the highest and most extensive nature. Not only did he preside in the curia regis next to the king, as supreme judge on all civil and criminal questions, but when the king was beyond sea, an event, we know, of very frequent occurrence in that age, he governed the whole realm as viceroy.

<sup>1</sup> Madox's Exchequer, 439, 203, 253.

That Glanville filled this elevated office to the satisfaction of the able and politic monarch who had placed him in it, may be inferred from the additional honours afterwards showered upon him. In 1183, he appears to have held the confidential office of “dapifer” to the king; in the same year, he was fermour of Yorkshire; both, doubtless, situations of considerable emolument as well as trust. He retained his office of chief justiciary, with undiminished honour and favour (excepting only an imputation which he appears to have incurred for an illegal or unjust sentence of death passed by him upon one Sir Gilbert de Plumpton), throughout the reign of Henry II. On the death of that prince, he assumed the order of the Cross, and died bravely fighting with the infidels at the siege of Acon, in the year 1190.

It has been doubted whether it was the same identical individual who filled all these various, and in some respects inconsistent characters—at once the judge, the author, the courtier, and the general. But the supposed incompatibility of these characters is founded in a forgetfulness of the manners of the age in which Glanville lived—when the sword was grasped in one hand and the missal in the other, and the unceasing alarm of foreign and domestic tumult might well compel the grave and learned lawyer to divest himself of his robes, in order to sheathe himself in armour. Neither do we see any just reason to doubt—notwithstanding the scepticism of Lord Lyttelton, who would attribute it to some clergyman writing under the direction of Glanville, assuming that no layman could in that age have acquired sufficient skill in the Latin language to have been its author—that the celebrated Treatise, of which we are now to speak somewhat more particularly, is truly attributed to him whose name it has borne from the earliest antiquity. Lord Coke pronounces upon it and him the following encomium:—“Ranulphus de Glanville, chief justiciary in the reign of King Henry the Second, learnedly and profoundly wrote of part of the laws of England (whose works remain extant at this day); and in his preface he writeth that the king did govern this realm by the laws of this kingdom, and by customs founded upon reason, and of ancient time obtained. By which words, spoken so

many hundred years since, it appeareth that then there were laws and customs of this kingdom, grounded upon reason, and of ancient time obtained, which he neither could nor would have affirmed, if they had been so recently and almost presently before that time instituted by the Conqueror. And in token of my thankfulness to that worthy judge, whom I cite many times in these Reports, as I have done in my former, for the fruit which I confess myself to have reaped out of the fair fields of his labours, I will, for the honour of him and of his name and posterity, which remain to this day, as I have good cause to know, impart and publish to all future and succeeding ages, that which I have found of great antiquity, and of undoubted verity, the original whereof remaineth with me at this day, and followeth in these words." The illustrious commentator then proceeds to quote a genealogical account, from which it appears that Glanville was born at Stratford, in the county of Suffolk, and was the founder of the mansion house of Butteley in that county; that he married Bertha, the daughter of Sir Theobald de Valeymz or Valence, Lord of Parham, with whom he received large estates in the same county; that by her he had three daughters, Matilda, Amabilia, and Helewisa, amongst whom he divided his possessions before his progress to the Holy Land. The document proceeds to describe the intermarriages and to trace the descendants of these ladies, and concludes with the following testimony to the nobility and personal prowess of the venerable judge:—"Et nota, quod præfatus Ranulphus de Glanvilla fuit vir præclarissimus genere, utpote de nobili sanguine; vir insuper strenuissimus corpore, qui provectioni ætate ad terram sanctam properavit, et ibidem contra inimicos crucis Christi strenuissimè usque ad necem dimicavit."

Selden, referring to the doubts which had been thrown upon the authenticity of the "*Tractatus de Legibus et Consuetudinibus Angliæ*," says—"I know the authority of this treatise is suspected, and some of the best and ancientest copies, having the name of E. de N., which I have heard from diligent researchers in this kind of learning, affirmed to have been some time E. de Narbrough, and not R. de Glanvilla, it hath been thought to be another's work, and of later time.

But as, on the other side, I dare not be confident that it is Glanville's, so I make little question that it is as ancient as his time, if not his work. The teste of the precedents of writs under his name, the language, especially the name of *Justitia* always for that which we now from ancient time called *Justiciarius*, (and *Justitia* was so used in writers under Henry the Second,) and the law delivered in it, tasteth not of any later age." Upon the whole, we may perhaps take leave to say that the doubts as to the authorship of this work appear to rest on no better foundation than the vague assumptions of literary scepticism. The far more extensive and complete work of Bracton was given to the world little more than half a century later; a clear proof enough that the education of a layman was thus early at least sufficient to enable him, not only to become master of the whole body of civil and English law, but also to communicate, in a style of freedom and elegance bespeaking an acquaintance with the best masters of the Latin language, the stores of knowledge he had so laboriously accumulated.

It has been supposed that Glanville drew up this summary or digest of the laws of England for public use, in obedience to the express command of Henry II., and in order to perpetuate the improvements he had made in the Norman laws, and to effect a more general uniformity of law and practice throughout the kingdom; a conjecture which appears to derive weight from the circumstance, that in a MS. existing in the library of Corpus Christi College, Cambridge, written in a hand of the age of Edward II., there is a treatise entitled "*Leges Henrici Secundi*," agreeing in many parts with the printed copy of Glanville. A MS. copy of Glanville's work is also in the Cottonian collection, which bears the same title. Some passages of the original preface or "prologue" to the book seem to favour the same conclusion.

The subject of the treatise, notwithstanding its general title, is confined to such matters only as were the objects of jurisdiction in the *curia regis*. Mr. Reeves gives the following concise abstract of the contents of the fourteen books of which it consists. "The first two treat of a writ of right, when commenced originally in the *curia regis*, and carry the

reader through all the stages of it, from the summons to the appearance, counting, duel or assise, judgment, and execution. In the third he speaks of vouching to warranty; which, being added to the two former books, composes a very clear account of the proceedings in a writ of right for recovery of land. The fourth book is upon rights of advowson, and the legal remedies relating thereto. The fifth is upon actions to vindicate a man's freedom; the sixth upon dower. The seventh contains very little concerning actions, but considers the subjects of alienation, descent, succession, and testaments. The eighth is upon final concords; the ninth upon homage, relief, and services; the tenth upon debts and matters of contract; and the eleventh upon attornies. Having thus disposed of actions commenced originally in the *curia regis*, in his twelfth book he treats of writs of right brought in the lord's court, and the manner of removing them from thence to the county court and *curia regis*; which leads him to mention some other writs determinable before the sheriff. In his thirteenth book he speaks of assises and disseisins. The last book is wholly upon pleas of the crown. The subject of this treatise is all along illustrated with the forms of writs; a species of learning which was then new, was probably brought into order and consistency by Glanville himself, and first exhibited in an intelligible way and with system in this book.

"The method and style of this work," adds the same author, "seem very well adapted to the subject; the former opens the matter of it in a natural and perspicuous order, while the latter delivers it with sufficient simplicity and clearness. The Latinity of it, however, may not satisfy every taste; the classic ear revolts at its ruggedness; and the cursory reader is perpetually impeded by a new and harsh phraseology. But the language was not adopted without design; the author's own account of it is this,—'*stylo vulgari, et verbis curialibus utens, ex industria, ad notitiam comparandum eis qui hujusmodi veritati.*' The author seems not to even at this distance of time; for through cannot fail of finding i



some difficulty he may have met with in another; the recurrence of the same words and modes of speaking makes Glanville his own interpreter." And it is truly observed, that although the book "is rather to be looked upon as a compendium than a finished tract, it must be considered as a valuable monument of the infant state of our laws, and as such will always find reception with the judicial historian, when thrown aside by the practising lawyer."

Glanville's treatise, although considered of high authority and value, appears to have remained in manuscript until so late as the year 1554, when, as we are informed by Lord Coke, it was first printed "by the persuasion and procurement of Sir William Staunford, a grave and learned judge of the Common Pleas," the author of the well known Treatise on the Prerogative of the Crown. It has since passed through several editions and translations, the last being that published by Mr. Beames, in 1812.

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It may not be altogether out of place to subjoin here, by way of postscript to our notices of Glanville and Bracton, a brief account of the treatises on English law, published in the reign of Edward I. under the name of Fleta and Britton, the authorship of which has never been ascertained.

"Fleta, seu Commentarius Juris Anglicani," is a treatise upon the whole body of English law as it existed at the time when it was written. It consists of six books, of which the first treats of the rights of persons and of pleas of the crown; the second of courts and offices; the third of methods of acquiring titles to things; the fourth and fifth of actions grounded upon a seisin, and of writs of entry; and the last, of the proceedings upon a writ of right. This outline is sufficient to show that the author adopted the general plan of Bracton, whom indeed he follows both in manner and matter, sometimes transcribing whole pages from his work. Many passages, however, both in Bracton and Glanville, which had been left obscure by those writers, are illustrated by Fleta, who appears to have written with their treatises before him, and to have designed to give a concise account of the points stated by them, with such additions as had been discovered since. In supplying such

matters as he had left untouched, and amplifying such as he had left obscure or imperfect. The book, in truth, amounts to little more than an abridgment of and appendix to Bracton. It was written after the 13th Edw. I., as appears from the frequent mention of the Statute of Westminster 2d.; and not much later, since there is no allusion to the statutes passed toward the close of that reign. The book owed its title, as the author himself informs us, to the circumstance of its having been written during his confinement in the Fleet prison.

The small French tract which passes under the name of Britton, was composed in the same reign, and most probably under the immediate direction of the king. It has the peculiarity of being supposed to be spoken, in the first person, by the sovereign himself. It has been attributed (amongst others by Lord Coke) to John le Breton, Bishop of Hereford, who was also one of the justices itinerant in the 52 Hen. III.; but as that prelate died in the third year of Edward I., and the book mentions the Statute of Westminster 2nd, passed in the thirteenth year of that reign, this is certainly an erroneous supposition. It is, indeed, like Fleta, little more than an abridgment of Bracton, with notices of the alterations that had been subsequently made in the law; and probably received the title of Britton as being one of the names already assigned to Bracton himself.<sup>1</sup>

#### SIR JOHN MORE.

Of this worthy judge, more distinguished by his having been the father of so illustrious a son, the Chancellor Sir Thomas More, than for any extraordinary talents or learning of his own, we know no more than the few scattered memorials transmitted to us by the son's biographers. Of his ancestors we have no account whatever; all the researches of those biographers, zealous as they were in the pursuit of evidence to countervail the received opinion of the Chancellor's obscure lineage, have failed to establish a single fact serving to trace his pedigree beyond his father. That he (the father) was bred to the law, was a member of the Society of Lincoln's Inn, and early acquired considerable reputation as a lawyer,

<sup>1</sup> See Law Magazine, No. 54, p. 269.

is all we learn of him until the year 1501, when, being then little short of his sixtieth year, he was committed by royal warrant to the Tower, and after an imprisonment of some months, set at liberty only on payment of a fine of a hundred pounds, equivalent perhaps to about a thousand of our money, on no other ground, we are assured, than that his son had incurred the displeasure of the avaricious tyrant who then filled the throne, by his boldness and honesty in opposing in the House of Commons, of which he very early became a member, a bill for an extravagant subsidy on the ill-fated marriage of the Princess Margaret to James the Fourth of Scotland. On his liberation, he resumed the exercise of his profession, and in Michaelmas term, 1505, was called to the degree of serjeant. In the year 1518 (being then about his seventy-fifth year), he was appointed a judge of the Court of King's Bench, which office he retained, without further promotion, until his death in 1533. It may be reasonably inferred, therefore, that his legal knowledge was not of the first order, since otherwise the influence of his son could hardly have failed to advance him to the highest post in his Court. The Chancellor himself, in the epitaph he wrote for his monument, describes his father as "homo civilis, innocens, mitis, misericors, æquus, et integer;" all admirable epithets wherewith to dignify the judicial character, but the more remarkable by the absence of any others descriptive of a reputation for wisdom or learning. He possessed, we are told, much of the jocose and pleasant humour which survived in his admirable son: one of his jests in particular, at the expense of the other sex, is transmitted to us by the great-grandson and biographer of the Chancellor:—"He would compare the multitude of women which are to be chosen for wives unto a bag full of snakes, having in it one eel: now if a man should put his hand into this bag, he *may* indeed chance to light on the eel, but it is a hundred to one that he shall be stung by a snake." So deep was the affection and veneration entertained for the venerable judge by his son, that we are assured it was his constant practice, in passing through Westminster Hall to his own more elevated seat in the Court of Chancery, to turn aside into the Court of King's Bench, and there bend his knee to his father for his blessing.

With the wealth amassed in the practice of his profession, Sir John More purchased the manor and large estates of Gubbins, or Gobions, in the parish of North Mims, in Hertfordshire, which long continued in his posterity. He furnished in his own person a practical refutation of the witticism recorded above; for he was thrice married. The names of his two first wives only have descended to us. The first was the daughter of a Mr. Handcombe, of Holywell, Bedfordshire, by whom he had an only son, the illustrious chancellor, and two daughters, the younger of whom became the mother of the eminent judge and profound lawyer, Rastall: the second was the daughter of a relative of the same name, John More of Losely in the county of Surrey, by whom, as also by his third wife, he had no issue. He died, as has been said, in the year 1533, two years only before his son's sacrilegious murder, at the great age of ninety, and then only, as his descendant informs us, of a surfeit occasioned by the immoderate eating of grapes, being still "lusty and strong;" and was buried in the church of St. Lawrence, in the Old Jewry.

#### FITZHERBERT.

Anthony Fitzherbert, the most distinguished writer on the law of England who flourished in the sixteenth century, descended from an ancient family, long and still settled at Norbury in Derbyshire, was the son of Ralph Fitzherbert, Esq., of that place. He was educated, as Anthony Wood assures us, in the University of Oxford, but at what college there is no record. Neither have we any account of his legal studies, until we find him in Michaelmas Term, 2 Hen. VIII. (1511), taking upon himself the rank of serjeant-at-law.<sup>1</sup> Six years afterwards, he was constituted one of the king's serjeants, and about the same period received the honour of knighthood.

<sup>1</sup> There is a curious entry in Dugdale as to one of the serjeants called on the same occasion, from which it appears that that high office was not always, in those days, an object so exceedingly to be coveted as at present, but that its possessors were occasionally in the predicament of having greatness thrust upon them: "Rex concessit Ricardo Brooke, quod ipse ad statum et gradum servientis ad legem suscipiendum contra voluntatem suam non assignetur, et quod, si electus sit, statim recipere recuset." In 1521 we find this recusant gentleman appointed one of the judges of the Common Pleas, and in 1526, Chief Baron of the Exchequer.

In 1522, he was appointed a judge of the Court of Common Pleas; "in which place," says Wood, "carrying himself with great prudence, justice, and knowledge, he became at length the oracle of the law, and was admired by all for his profundity in it." The same writer represents him as having been "an enemy to Cardinal Wolsey." He died in 1538, leaving by his wife Matilda, daughter and coheir of Sir Richard Cotton, of Hamstall Redware, Staffordshire, a numerous issue, the second of whom was the lineal ancestor of the present distinguished Catholic family of Fitzherbert of Norbury, and of Swinnerton in the county of Stafford. He was buried in the parish church of Norbury, and a stone of blue marble was laid over his grave, with an inscription, which was remaining in Anthony Wood's time.

The first production of this author was his "Grand Abridgement of the Common Law contained in the Year Books, and other Books of Law, Readings, and Reports," first printed by Pynsen in 1514, and reprinted so early as 1516 by Wynkyn de Worde. It is a work of great learning and ability, and must have been a vast acquisition to the lawyers of that time, bringing down, as it did, the cases to the very period of its publication, and abstracting them very fully and accurately. It was afterwards, to a great extent, superseded by the fuller abridgement of Brookes which was first published in 1586; but on the other hand, the original cases of the reigns of Henry III. Edward I. and II. and Richard II. together with scattered cases in other reigns, to be found only in Fitzherbert, preserve to it a value altogether its own.

His other great work, the *Natura Brevium*, appeared in 1534. It consists of a treatise on the nature and effect of the principal writs contained in the *Registrum Brevium*; but having been published at a period when many of those writs were already falling into disuse, and soon afterwards became altogether obsolete, but a small portion of the work long continued, and still less can now be deemed, to possess any value as applicable to the existing forms of procedure. Its accuracy and completeness have however obtained for it a high reputation; Lord Coke terms it "an exact work exquisitely penned." Besides these works, Sir Anthony Fitz-

herbert was the compiler of a treatise on the office and authority of justices of the peace, and of another on the office of sheriffs, constables, coroners, &c. A volume "on the diversity of Courts" is also attributed to him by Lord Coke. In addition to these legal works, several volumes on agriculture have been ascribed to the learned judge, but it is doubtful whether they did not proceed from the pen of his elder brother, John Fitzherbert.

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**ART. XI.—LORD CAMPBELL'S PROPOSED REFORM OF THE APPELLATE JURISDICTION.**

ON the first of March last Lord Campbell laid on the table of the House of Lords three bills. The one appoints a permanent judge to preside in the Court of Chancery; the second transfers the hearing of all appeals from the judicial committee of the Privy Council to the House of Lords; and the third empowers her Majesty to summon the House of Lords during the prorogation of parliament to sit for the hearing of appeals, and also empowers her Majesty to summon to the House of Lords the chief justice of the Court of Chancery, the vice-chancellors, the judge of the Prerogative Court, and the judge of the High Court of Admiralty. The plan to be effected by the two latter bills is that which we are about to consider.

The speech with which his lordship introduced these bills has been circulated. It wholly failed in eliciting from the public or from the profession any approbation of the plan, if plan it may be called, or in averting the unqualified discountenance it received in the House of Lords from the present and the late Lord Chancellor and from Lord Brougham.

Lord Campbell fully admits the glaring anomalies and defects of our present appellate judicature. The existence of two appellate Courts co-ordinate—of equal authority—neither bound by the judgment of the other—the embarrassments which would arise from a discrepancy between their decisions—the comparison which will be drawn between them—the different degrees of confidence with which each may be regarded.

Although we see in Lord Campbell's plan great innovation, yet we look in vain for the removal of any one of these evils. It deprives the colonies of their constitutional right of appeal to their sovereign—a right coeval with their original settlement, recognized and confirmed by acts of their legislatures, and by those acts incorporated into and forming part of their judicial system; and it makes another innovation on the constitution of England, by taking from the crown and transferring to the House of Lords a jurisdiction which the latter never possessed.

It is no part of Lord Campbell's plan to impose on the members of the House of Lords a more real and substantial part in the hearing and decision of appeals than that which they at present take. If there be ex-lord chancellors of England and Ireland in the House, those noble and learned persons will, as at present, be the only peers who take a part in the hearing of appeals. The same learned persons now constitute also a part of the judicial committee of the Privy Council. In transferring therefore to the House of Lords the jurisdiction belonging to the judicial committee of the Privy Council, Lord Campbell's plan would effect no other change but that of the *place* in which the appeals were heard. We doubt whether his expectation, that in consequence of his plan "the suitors in the Ecclesiastical or Admiralty Courts must rejoice," is more likely to be realized than his other expectation, "that all the colonies must rejoice" in a plan which not only in itself, but in the mode in which it is sought to be effected, would be a direct violation of their constitution.

We entirely concur with Lord Campbell in considering it essential to the constitution of a supreme Appellate Court, that there should be a permanent head to preside over it. But his plan does not give a permanent head to his proposed Court of Appeal, for it is to be presided over by the Lord Chancellor, who will continue such head no longer than his party remain in power, or the crown chooses to retain him. But there is another serious objection to this part of his plan. The judges of the courts of original jurisdiction are, as they ought to be, wholly independent of the crown, and hold their offices *quandiu se bene gesserint*, but the President of the Supreme Appellate Court of the empire is to be a political



minister, who holds his office only during the pleasure of the crown.

In our number for May 1841, we referred to Mr. Borge's observations on the Supreme Appellate Jurisdiction of Great Britain. Lord Campbell, we should infer from some passages in his speech, was favourable to the view taken by that learned gentleman of the expediency of giving to the court of ultimate appeal its own separate judges, unconnected with, and not required to discharge the duties of any court of original jurisdiction. Mr. Borge states that the appellate courts in the different states of Europe were constituted on this principle. He mentions the following fact as illustrating the superiority of those institutions.

"It is a striking proof of their weight and authority, that with very few exceptions, the only reported decisions of the continental courts are those of their Supreme Courts of Appeal. Those reports still retain their high character, and are the best depositories of the jurisprudence of Europe."

Lord Campbell thus combats the objection, "that the appellate judge cannot properly discharge his duty, unless he is at the same time sharpening his faculties, by acting occasionally as a judge of a court of original jurisdiction." His Lordship says,

"There is no ground for this objection either in reason or from experience. The judicial business of this House must be abundantly sufficient to exercise the understanding, and to keep up the learning of any judge, and he may see more clearly when always elevated above the heats and mists which may obscure the inferior regions of the law. In no foreign country are the judges of the court of last resort allowed to sit in a court of original jurisdiction; and it is a curious fact, that in those foreign countries, generally speaking, it is only the decisions of the courts of last resort that are reported and received as authentic declarations of the state of the law, while in England, almost the whole body of the law is traced to reports of the decisions of the inferior courts, and Sir John Leach

<sup>1</sup> "See the list of the eminent reporters of the decisions of the principal Appellate Courts of Europe in the preface to the reports of Mævius, to which may be added the Reports of Christinæus, Carpzovius, Stockmans, Wynant, Neostad, the Journal des Principales Audiences du Parlement, by Du Fresne, François Jamet de la Guesniere, and Nupied, and the Discursus Legales of Casaregis, &c. See also Hertius, Diss."

would not allow the decisions of the Privy Council to be quoted as authority, and very much regretted that they were ever printed."

After these observations we did not expect that it would be part of his Lordship's plan, that the court of ultimate appeal should consist *entirely* of judges, who exercised original jurisdiction in other courts, with the single exception of the Lord Chancellor, but so it is.

Lord Campbell's plan, therefore, is subject to all the objections which have been fairly urged against a court composed of judges taken from the other courts.

Mr. Burge says,—

"The primary object, and the primary duty of him, whose learning and practice have conducted him to a judicial seat in a court of law, will be his attendance on that court, and the discharge of his duties as one of its judges. Imperceptibly, and in spite of himself, as often as he is called away to the Privy Council to sit as a judge, his attendance and his duty *there* will be felt by him to be objects secondary in respect of the obligations imposed on him, secondary too in respect of the interest they excite, and the alacrity and zeal with which he pursues them. He will imperceptibly feel, as we all do, the irksomeness of a duty which is regarded secondary in its claim on our attention, and that irksomeness will be the greater, in finding himself for a time withdrawn from a jurisprudence with which he is familiar, to apply his attention to that which had formed no part of his professional education, and which can scarcely afford him any interest.

"Under such disadvantages it must require a continued effort on the part of the judge to watch and suppress any lurking desire to accelerate the disposal of the case, and relieve himself from an irksome duty. He is too much exposed to the risk of imitating those judges described by the Chancellor D'Aguesseau, "*qui voyent croître les procès sous leurs yeux avec une attention inquiète, et qui se laissant emporter à l'ardeur dévorante de leur génie, se hâtent de cueillir et de présenter aux plaideurs les fruits encore amers d'une justice prématurée. Le magistrat instruit de ses devoirs sait qu'il y a quelquefois plus d'inconvénient à précipiter la décision, qu'à la différer.*"

"There is cause to apprehend that there may be too great an inclination to presume the sentence appealed from to be right, and too great a desire to sustain it, instead of reviewing the case without any bias, and with the same consideration as if it had never been previously decided by any court.

**"Surely the constitution of an Appellate Court is defective, when it exposes its members to the risk of treating their attendance, and the performance of their duties as secondary in importance, and makes the patient and deliberate hearing of the causes, the result of a struggle between the natural tendency of the circumstances in which they are placed, and the dictates of a deep sense of the responsibility which they have incurred."**

This plan also fails in securing to the public the possession by the Supreme Appellate Court of the necessary acquaintance with the foreign systems of jurisprudence which it has to administer. It would fail also in securing the attendance of a separate bar. If these objects could be attained, not only would the appellate tribunal afford more adequate means of satisfying the just claims of the suitor, but foreign jurisprudence and the principles of international law would become objects of study, and form a branch of professional education. It would no longer be the reproach of this country, that a branch of knowledge of such importance in her present relations was so greatly neglected.

We consider Lord Campbell's plan to have merited the disapprobation it has universally received. We wish that the actual state of our Appellate Courts could be made the subject of inquiry by a select committee of either House of Parliament, with the view of ascertaining the manner in which the jurisdiction was administered, and of collecting the opinions of the most eminent men on the mode in which the admitted defects of the system might be removed, and a proper court of ultimate appeal instituted.

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## DIGEST OF CASES.

### COMMON LAW.

[Comprising 12 Adolphus & Ellis, Parts 1 and 2; 1 Gale & Davison, Part 4; 2 Scott's New Reports, Part 5; 3 Scott's New Reports, Part 1; 2 Manning & Granger, Part 2; 8 Meeson & Welsby, Parts 4 and 5; 1 Dowling's Practice Cases (New Series), Part 1; 2 Moody & Robinson, 3; and a selection from 1 Carrington & Marshman (in continuation of Carrington & Payne), Part 1;—all cases included in former Digests being omitted.]

#### ACTION ON THE CASE.

(*For injury by the setting of dog-spears.*) Declaration in case alleged, that the defendant wrongfully and unlawfully set and concealed a dog-spear, the same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the Queen as to their dogs happening to run upon the same, among the bushes near a public footway, running through a close of the defendant's; by means whereof a dog of the plaintiff's, with which he was going on foot along the said footway, and which, by reason of a rabbit having crossed the footway in his view, had then, against the will of and unavoidably by the plaintiff, begun to pursue and was in pursuit of the said rabbit, ran upon the dog-spear and was wounded, &c. Plea, that the defendant set and concealed the said engine for the purpose of preserving his game, and of disabling and killing dogs that might come upon his close, lest they should pursue and destroy the game, *whereof the plaintiff had notice*: Held, on general demurrer, that this plea was a good answer to the action: and that it would have been so even without the allegation of notice.—*Jordin v. Crump*, 8 M. & W. 782.

#### AFFIDAVIT.

(*Jurat.*) If an affidavit be duly entitled in the proper Court, it is sufficient in the jurat to describe the person before whom it is sworn as "a commissioner, &c." *Burdekin v. Potter*, 1 D. P. C. (N. S.) 134.

#### ARBITRATION.

1. (*Jurisdiction of the Court over arbitrators' fees.*) The Court has no general jurisdiction over arbitrators as to the amount of fees charged by them, whether the reference be under a rule of Court or not.

Nor over those of the attorney who prepares the award.

*Quære*, whether their going before the master and submitting their demand to

his taxation subjected the arbitrators and the attorney to such jurisdiction. A clear intention so to do must at all events be shown.—*Dossett v. Gingell*, 3 Scott, N. R. 179.

2. (*Power of Court to enlarge time for award.*) Where an arbitrator, to whom a cause is referred by an order of *Nisi Prius*, has power to enlarge the time for making his award, and omits to exercise that power, the 3 & 4 Will. 4, c. 42, s. 39, it seems, does not enable the Court or a judge to enlarge the time. (*Sed quare*; see 7 M. & W. 378.)—*Lambert v. Hutchinson*, 3 Scott, N. R. 221.
3. (*Execution on award—Authority of Court under 1 & 2 Vict. c. 110, s. 18, 19.*) The Court has authority, under the stat. 1 & 2 Vict. c. 110, ss. 18 and 19, to order a party by rule to pay a specific sum of money awarded by an arbitrator to be paid by him; and on such rule being made absolute, execution may issue against the party for the amount so specified in the rule.—*Doe v. Amey*, 8 M. & W. 565; 1 D. P. C. (N. S.) 23.

And see PLEADING, 2.

### ASSUMPSIT.

- (*Consideration.*) In support of account upon an account stated, the plaintiff offered in evidence an account signed by the defendant, showing a balance of 321*l.* 5*s.* to be due. The first item in this account was "To principal and interest of old account with Dr. J. French transferred as per letter, 146*l.* 3*s.* 6*d.*" The letter was as follows:—I hereby acknowledge to have received from J. M. French, Esq., the sum of 321*l.* 5*s.*, and should I die during my absence from England, or at any time before the said debt is liquidated, it is my desire that he should be paid out of whatever property I might possess at the time of my death, with legal interest on the same." Held, that the plaintiff was not entitled to recover the 146*l.* 3*s.* 6*d.*, the evidence showing a mere promise, without consideration, to pay the debt of a third person.—*French v. French*, 3 Scott, N. R. 121.

### ATTORNEY.

1. (*Negligence—Pleading.*)—If an attorney, in the conduct of a suit, commits an act of negligence whereby all the previous steps become useless in the result, he cannot recover for any part of the business done. And whether or not, in such a case, the work became wholly useless by the plaintiff's fault, is a question for the jury.

Such a failure of the work is a defence admissible under non-assumpsit, in an action on the attorney's bill. (2 C. M. & R. 547; 2 M. & W. 283.)—*Bracey v. Carter*, 12 Ad. & E. 373; *Symes v. Nipper*, id. 377, n.

2. (*Re-admission.*) The Court, under very peculiar circumstances, allowed an attorney to be re-admitted at once, without giving the usual notices, on payment of the arrears of duty and of a nominal fine.—*Ex parte Legh*, 1 D. P. C. (N. S.) 188.

### BANKRUPTCY.

1. (*Indorsement by bankrupt of note.*) In an action by the holder of a promissory note, indorsed generally by the payee, to a plea that the payee indorsed it after he became bankrupt, the plaintiff replied that he *bonâ fide* took and received the note before the payee became bankrupt, without notice of any act of bankruptcy, and not by way of fraudulent preference. It appearing that the payee indorsed the note in blank before he became bankrupt, to a person who delivered it after

the bankruptcy to the plaintiff: Held, that the defendant was entitled to the verdict on the issue.—*Green v. Steer*, 1 G. & D. 499.

2. (*What rights of action pass to assignees.*) The right of action for the seduction of a servant does not pass to the master's assignees on his bankruptcy.—*Howard v. Crowther*, 8 M. & W. 601.

3. (*Goods in custody of messenger not privileged from distress—Construction of 6 Geo. 4, c. 16, ss. 74, 75.*) Goods seized by a messenger under a fiat in bankruptcy are not, while in his custody, privileged from distress for rent due from the bankrupt to his landlord.

The 7th section of the Bankrupt Act, 6 Geo. 4, c. 16, applies only to rent accrued due before the bankruptcy.

Where the assignees of a bankrupt, under the 6 Geo. 4, c. 16, s. 75, have declined a lease to which the bankrupt was entitled, but the bankrupt has not delivered up the lease to the lessor, the property in the demised premises, in the mean time, continues vested in the bankrupt, and the lessor retains, until such delivery up to him, his right of distress for the rent.

*Semble*, that the effect of that section is only to exempt the bankrupt from personal liability, and not to affect the landlord's right of distress.

*Semble*, also, that it applies only to cases where covenants are broken or rent becomes due after the delivery up of the lease by the bankrupt.

*Quære*, whether it applies to a case of a demise not in writing.—*Briggs v. Sowry*, 8 M. & W. 729.

4. (*Liability of official assignee for costs.*) The official assignee of a bankrupt is liable to the costs of defending an action brought against him and the creditor's assignee, if he joined in retaining the attorney.—*Sydney v. Belcher*, 2 M. & Rob. 324.

And see **BILLS AND NOTES**, 5; **HUSBAND AND WIFE**; **PROCHER AMY**; **WITNESS**, 6, 7.

**BILL OF LADING.** See **CARRIER**.

**BILLS AND NOTES.**

1. (*Notice of dishonour.*)—In an action by indorsee against drawer of a bill of exchange, proof that the plaintiff, on the day on which he himself received notice of dishonour from the holder, wrote and sent a letter to the defendant, and proof of notice to produce that letter as containing notice of dishonour, and that the defendant, when applied to by plaintiff for payment of the bill, objected that it had not been presented to the acceptors in due time, but did not object that he had not had notice of dishonour, are, on default to produce the letter, evidence that it contained a regular notice of dishonour. (1 M. & Rob. 41.)—*Curler v. Corfield*, 1 G. & D. 489.

2. (*Failure of Consideration.*)—To a declaration by the indorsee of a bill of exchange, drawn by K. and accepted by the defendants, they pleaded that K. was a trader in Ireland, accustomed to consign goods to them by carrier, as his commission agents at Liverpool, and that the usual course of business was as follows:—K., on consigning goods from time to time, took a receipt bill of lading for the goods signed by the carrier, and obtained advances of money from the plaintiff, on indorsing to him the bill of lading, and also a bill of exchange, drawn by K. upon the defendants, for the amount of such goods; the plaintiff then remitted the bill of exchange to the defendants for acceptance, and also the bill of lading, indorsed by himself, and thereupon the defendants, on the faith of

the bill of lading, and in consideration of such security on the goods, were accustomed to accept such bill of exchange. That at the time of the drawing and indorsing by K. to the plaintiff of the bill of exchange in question, K. indorsed to the plaintiff a bill of lading, the carrier's signature to which was forged, well knowing the same, &c., and on the faith thereof obtained the usual advance, to wit, the amount of the bill of exchange; that the defendants, on the remittance to them by the plaintiff of the forged bill of lading, indorsed by him, and of the bill of exchange, accepted the latter, at his request, without notice, &c., and so the consideration for their acceptance wholly failed: Held, that as the plaintiff was indorsee of the bill of exchange for value, and it was not averred that he obtained the acceptance by any fraudulent representation, or that he knew the bill of lading to be forged, the failure of consideration between K. and the defendants was no defence, and the plaintiff was entitled to judgment non obstante veredicto.—*Robinson v. Reynolds*, (in error), 1 G. & D. 526.

3. (*Liability for bill made by agent.*)—Where it is sought to charge a party by the acceptance or indorsement of a bill by an agent, by reason of the latter having similarly drawn and indorsed bills on former occasions, it must be distinctly shown that the principal knew or had the means of knowing that fact.—*Davidson v. Stanley*, 3 Scott, N. R. 49.
4. (*Indorsement, what amounts to a traverse of.*) Declaration on a bill of exchange drawn by J. H. upon and accepted by the defendant, alleging that J. H. indorsed it to E. M., and E. M. indorsed it to the plaintiff. Plea, that J. H. did not indorse the bill to E. M. At the trial J. H. proved that the name J. H. written on the back of the bill was written by himself; that he had received the bill as the accountant to the Imperial Bank, for a debt due to the bank, and that after writing his name on it he had delivered it to W. M., who was also employed in the bank, to be kept by him for the bank. E. M. proved that he had received the bill from W. M., as he said, for value, and indorsed and delivered it for value to his father, the plaintiff. The defendant proposed to controvert this, and to shew that both E. M. and the plaintiff received the bill with full knowledge of the fraud committed by W. M. in handing over the bill. The learned judge rejected this evidence as inadmissible under the plea denying J. H.'s indorsement, and the plaintiff obtained a verdict: Held, on motion for a new trial, that the evidence rendered ought to have been received, as, if the facts stated had been fully proved, the jury ought to have found for the defendant on the issue that J. H. did not indorse the bill to E. M., for although there was an indorsement on the bill, there was no valid delivery by J. H., or by any authority from him, and so no complete transfer by indorsement to E. M. (4 P. & D. 474.)—*Marston v. Allen*, 8 M. & W. 494.
5. (*Estoppel on acceptor to deny payee's title to indorse—Pleading—Plea of Bankruptcy.*) Assumpsit by indorsee against acceptor of a bill of exchange drawn by B. Plea, that before the making of the bill, to wit, on &c., a commission of bankruptcy under the great seal of Great Britain was duly awarded against B. and C., then being traders and co-partners, under which they were duly declared and adjudged bankrupts; that B. obtained his certificate under that commission, and was thereby discharged according to the laws concerning bankrupts; that afterwards, and before the making of the bill of exchange, to wit, on &c., B., being a trader subject to the bankrupt laws, and indebted to O. in 100*l.*, became and was a bankrupt, and afterwards, to wit, on &c., a certain other commission



of bankruptcy was duly awarded against him on the petition of O., under which he was duly adjudged and declared to be a bankrupt, and O. was duly chosen and appointed and became assignee of his estate and effects as such bankrupt; that afterwards, to wit, on &c., B. duly obtained his certificate under the last-mentioned commission; and that B.'s estate did not then or at any other time produce, after all charges, sufficient to pay the several creditors who had proved their debts under the last-mentioned commission 15s. in the pound; that by reason of the premises, the bill of exchange in the declaration mentioned, after the acceptance and delivery thereof by the defendant to B., and before the indorsement thereof by B., became and was the property of O., as such assignee, and B. indorsed the bill without having any right, title, or authority so to do, and the plaintiff was not nor is the legal holder thereof.

Held, on special demurrer, that this plea was bad, on two grounds; first, that the defendant was estopped, by his acceptance of the bill payable to B.'s order, from saying that B. was incapable of transferring the bill by indorsement; and secondly, that the plea ought, even if the defendant could set up such a defence, to have set forth fully all the proceedings in the bankruptcy.—*Pitt v. Chuppelov*, 8 M. & W. 616.

6. (*Giving time to prior indorser.*) Where time was given to a prior indorser, after judgment had been signed in an action on the same bill against a subsequent indorser: Held, that the Court could not interfere to set aside the judgment on that ground, as the judgment could not be affected by such indulgence being given after it was signed.—*Bray v. Manson*, 8 M. & W. 668.
7. (*Consideration—Onus of proof, when on defendant.*) On replication de injuriâ to a plea by the acceptor of a bill, that it was accepted for the accommodation of the drawer, and by him indorsed to A. B. without consideration for the purpose of raising money, and by A. B. fraudulently indorsed to C. D. without consideration, and by him to the plaintiff without consideration, the defendant must prove the want of consideration from plaintiff to C. D.—*Brown v. Philpot*, 2 M. & Rob. 285.
8. (*Indorsement—Evidence of identity of indorser.*) In an action against the acceptor of a bill of exchange purporting to be drawn and indorsed by A. B., proof that the bill was indorsed by the same person who drew it is sufficient, though that person is shown not to be A. B.—*Smith v. Moneypenny*, 2 M. & Rob. 317.
9. (*Bill of exchange, what is—Forgery.*) A document in the ordinary form of a bill of exchange, but requiring the drawee to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawee, cannot, in an indictment for forgery and uttering, be treated as a bill of exchange.—*Reg. v. Bartlett*, 2 M. & Rob. 362.
10. (*What is a promissory note.*) A paper in the following terms: "I, A. B. owe Mrs. E. the sum of £6, which is to be paid by instalments, for rent," is not a promissory note, no time being mentioned. (7 D. P. C. 598.)—*Moffat v. Edwards*, 1 Carr. & M. 16.

And see BANKRUPTCY, 1; COSTS, 6; PLEADING, 7.

## BOND.

(*Pleading—Assignment of breaches on.*) The stat. 8 & 9 Will. 3, c. 11, s. 8, does not authorize the assignment of breaches in a replication which traverses a material averment in the plea.

In debt on bond, the defendant, after setting out the condition of the bond on over, pleaded performance of part of the condition only, and matter of excuse for non-performance of the residue: Held, that the replication, which commenced by assigning a breach which would have been a good answer to the plea at common law, and then, as a necessary introduction to the assignment of other breaches, proceeded to traverse the matter of excuse, was bad, on the ground that the statute does not authorize any double pleading, except the multiplication of such breaches as could have been properly assigned at common law: Held, also, that a replication traversing the matter of excuse, though affirmative, properly concluded to the country, without assigning a breach.—*Webb v. James*, 3 M. & W. 645: 1 D. P. C. (N. S.), 36.

#### CARRIER.

(*Delivery of goods under bill of lading—Liability of carrier—Evidence from former dealings.*) The plaintiff below declared upon a contract by the defendant below safely and securely to carry and convey by a steam vessel certain goods of the plaintiff below from Belfast to Dublin, and from thence to the port of London, and to deliver the same at the port of London to the plaintiff or his assigns, on payment of freight, &c., assigning for breach the non-delivery in London.

The defendants below pleaded (thirdly), that the goods were put on board under a bill of lading, by which they were made deliverable to the plaintiff below or his assigns, on payment of freight; that, after the arrival of the vessel at London with the goods on board, the defendants below caused them to be unshipped and safely and securely landed and deposited in and upon a certain wharf called Fenning's Wharf, at the port of London, there to remain until they could be delivered to the plaintiff below or his assigns according to the tenor and effect of the bill of lading, the said wharf being a place at which goods conveyed in steam vessels from Dublin to London were used and accustomed to be landed and deposited for the use of the consignees thereof, and a place fit and proper for such purpose; and that afterwards, and whilst the goods remained and were deposited upon the said wharf for the purposes aforesaid, and before a reasonable time for the delivery thereof according to the tenor and effect of the bill of lading had elapsed, the goods were there destroyed by an accidental fire; and (fourthly), that, after the arrival of the vessel at London with the goods on board, the defendants below were ready and willing to deliver the same to the plaintiff below or his assigns according to their promise, but that neither the plaintiff below nor his assigns was or were there ready to receive the same, whereupon the defendants below caused the goods to be unshipped and landed on Fenning's Wharf, there to remain until the plaintiff below or his assigns should come and receive the same, or until the same could be conveyed and delivered to the plaintiff below or his assigns, (with the same averment of the place being usual, fit, and proper, as in the third plea); and that afterwards, and whilst the goods remained and were deposited for the purposes aforesaid, and before the plaintiff below or his assigns came or sent for the same, and before the defendants below were requested to deliver the same to the plaintiff below or his assigns, or a reasonable time for conveying them from the said wharf to the plaintiff below or his assigns had elapsed, and before the same could be removed therefrom, the goods were destroyed there by an accidental fire:

Held, (affirming the judgment of the Court below,) that both these pleas were bad in substance, inasmuch as they neither alleged a delivery of the goods to the consignee or his assigns, nor that a delivery at Fenning's Wharf was a delivery to him or them according to the usage of the port of London with respect to

goods on such a voyage, nor that the plaintiff below had notice of the arrival of the goods, nor that a reasonable time for the plaintiff below or his assigns to come and receive them had elapsed when the goods were landed or when they were destroyed, nor that the plaintiff below or his assigns had notice that the defendants below were ready and willing to deliver the goods;—for that if, as the goods were deliverable to the plaintiff below or his assigns, the defendants below were not bound to deliver them until they had notice that the plaintiff below or some assigns would receive, or until the party entitled should come to receive them, still the defendants below were bound to keep the goods on board (or on the wharf at their own risk) for a reasonable time, to enable the consignee or his assigns to come and fetch them, and they continued liable until such reasonable time had elapsed.

To a second count, on a promise in consideration of the previous delivery to be carried to London for freight, and of the employment of the defendants below by the plaintiffs below, for other reward, to take care of the goods at the wharf where they should be landed, and to carry and convey the same from such wharf to the place of business of the plaintiff below, and there to deliver them to the plaintiff below in a reasonable time after landing, and assigning for breach the non-delivery of the goods, although a reasonable time for that purpose had elapsed—the defendants below pleaded that after the arrival of the steam vessel in London with the goods on board, and after the goods had had been safely landed at Fenning's Wharf, the defendants below caused the same to be safely deposited and stored upon the wharf until they could be carried and conveyed to the plaintiff below, the said wharf being a usual and fit and proper place for that purpose: and that the defendants below took care of the goods whilst they remained upon the wharf, until afterwards, and before they could be conveyed or the time for the delivery thereof to the plaintiff below had elapsed, the goods were destroyed by an accidental fire; by means whereof and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in the defendants below, they were prevented from delivering the goods to the plaintiff below.

Held (reversing the judgment of the Court below), that the plea was a good answer to the count—the contract to carry from the wharf for other reward not being of the same nature as the contract to carry to it, there being no averment in the count that the defendants below were common carriers, and if they were not subject to the liability of common carriers whilst the goods were in the warehouse, all that they were bound to do by the contract as alleged in the count, was to take reasonable care of the goods whilst there.

At the trial the judge allowed evidence to be given on the part of the plaintiff (written and parol) of former dealings between himself and the defendants as to the carriage of goods from the defendant's wharf to the plaintiff's place of business: Held, that such evidence was properly admitted, not for the purpose of superadding any condition to, or in any manner varying or altering the written contract, but for the purpose of ascertaining the course and usage of delivery in the port of London.

Held, also, that the judge was warranted in declining to tell the jury, that a delivery at Fenning's Wharf was in point of law a sufficient delivery, and discharged the defendant from all further responsibility, and that no contract could be inferred from the course of dealing to vary or superadd to the written contracts in the bills of lading; and that the jury were properly directed, that the question whether or not there had been a delivery of the goods, was a question for

their consideration, and that it was for them to say whether upon the whole of the evidence a delivery at Fanning's Wharf was a delivery according to the usage and practice of delivering goods observed in the port of London.

And, *semble*, that the judge was not bound to tell the jury, that, if the goods were in the defendant's hands after they were landed upon the wharf, they were in their hands as warehousemen only, and not as carriers.—*Bourne v. Gatliff*, 3 Scott, N. R. 1.

**CERTIORARI.** See *CARRA*, 2.

### CHEQUE.

(*Presentment of.*) The holder of a banker's cheque ought to present it for payment within a reasonable time, and it is a question for the jury, on an issue of due presentment, whether this rule has been complied with.

Where a cheque drawn on a country banker, dated 19th March, was not presented until the 6th April, and no cause was assigned for the delay, but the drawer had not sustained loss by the non-presentment at an earlier period, the drawer was held liable to be sued on the cheque.—*Serie v. Norton*, 2 M. & Rob. 401.

**CHURCHWARDEN.** See *PEW*.

### CHURCH RATE.

1. Where the churchwardens duly convene a parish vestry, and propose a rate for the necessary repair and expenses of the parish church, which a majority of the parishioners assembled at such vestry then refuse to make; a rate made by the churchwardens alone, at a subsequent day and meeting, not being a parish meeting, is illegal and void. Therefore, where the churchwardens libelled a parishioner in the spiritual Court for non-payment of such rate, and the above facts appeared on the face of the rate and in the proceedings in that Court, and the judge admitted the libel to proof, the Court of Queen's Bench held that a prohibition ought to be awarded: which judgment was affirmed on error by the Court of Exchequer Chamber.—*Burder v. Veley*, 12 Ad. & E. 233; *Veley v. Burder*, *id.* 265.
2. The obligation of parishioners to repair the body of the parish church is by the common law, and is not qualified or voluntary, but absolute and imperative; and where repairs are needed, the only question on which the parishioners in vestry can by law deliberate is, how the obligation may be best, most effectually, and most conveniently and fairly between themselves carried into effect.—*Veley v. Burder*, 12 Ad. & E. 265.

### COGNOVIT.

1. (*What amounts to.*) An action having been brought, and issue joined, and notice of trial given, the defendant signed a consent for a judge's order for a stay of proceedings, on payment of debt and costs by a certain day, with the usual condition, that, in default of payment, the plaintiff should be at liberty to sign final judgment, and issue execution. No attorney attended on behalf of the defendant when the consent was given; but both parties appeared before the judge when the order was made: Held, that the consent did not amount to a cognovit, and did not require a stamp, or the attendance of an attorney at the time of its execution, pursuant to the provisions of 1 & 2 Vict. c. 110, s. 9.—*Bray v. Manson*, 8 M. & W. 668.
2. (*Same.*) Where a defendant, on being served with process in an action,

went to the plaintiff's attorney, and without any attorney attending on his behalf, signed a consent for a judge's order for the payment of the debt and costs on a particular day, and in default thereof, that the plaintiff should be at liberty to sign judgment and issue execution; in consequence of which a judge's order was subsequently obtained by the plaintiff's attorney *ex parte*, and default having been made, judgment was signed, and execution issued: Held, that the consent did not amount to a *cognovit*, or require to be attested according to the provisions of 1 & 2 Vict. c. 110, s. 9.—*Baker v. Flower*, 8 M. & W. 670.

#### COINING.

(*Joint uttering.*) If two persons jointly prepare counterfeit coin, and then utter it at different shops, apart from each other, but in concert and intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly — *Reg. v. Hurse*, 2 M. & Rob. 360.

#### CONCEALMENT OF BIRTH.

1. (*Indictment.*) An indictment for concealing the birth of a child "by secretly disposing of the dead body," without showing the mode of disposing of the dead body, is bad.—*Reg. v. Hounsell*, 2 M. & Rob. 292.

2. On an indictment for concealing the birth of a child, a final disposition of the body must be shown; hiding the body in a place from which a further removal is contemplated, will not support the indictment.—*Reg. v. Ash*, 2 M. & Rob. 294.

And see INDICTMENT, 1.

#### CONDITION PRECEDENT.

An agreement between a debtor and his creditors, whereby the former, on assigning his property to trustees, was to be relieved from personal molestation, containing a proviso "that the agreement should be void unless the creditors of the defendant, whose names and descriptions were stated on the other side of the said agreement, should concur in the said agreement:" Held, that this was not a condition precedent, the performance of which the debtor was bound to aver in setting up the agreement, as an answer to an action at the suit of one of the creditors who was a party thereto.—*Matthews v. Taylor*, 3 Scott, N. R. 52.

#### CONTRACT OF SALE.

(*Delivery, what amounts to.*) The defendants, auctioneers, sold by public auction to the plaintiff, for a certain sum, a rick of hay, the produce of a crop distrained for rent, and which remained upon the land. By the conditions of sale, the lot was to be taken away at the purchaser's expense within one week; but at the time of the sale, the auctioneers obtained from the tenant, and read in the auction-room, a written consent that the hay should remain upon the premises for an extended period. Before the expiration of that time, the plaintiff having paid for the hay, received from the defendants an order upon the tenant to permit him to carry it away. The tenant refusing to allow the hay to be removed, the plaintiff sued the defendants, who pleaded "that they did deliver to the plaintiff the possession of the said rick of hay, according to their promise in that behalf:" Held, a good answer to the action.—*Salter v. Woollams*, 3 Scott, N. R. 59.

CORPORATION. See REFORM ACT.

#### COSTS.

1. (*Not payable except by party to the record.*) The Court has no power after a judgment for the defendant in a personal action to make a third party pay the

costs on the ground that he was the real plaintiff. (4 M. & W. 194; 8 D. P. C. 517.)—*Evans v. Rees*, 1 G. & D. 579.

2. (*On indictment removed by certiorari.*) Where an indictment preferred by the Metropolitan Police Commissioners for an assault upon a constable belonging to their force has been removed by the defendant by certiorari, they are entitled on conviction to costs under 5 W. & M. c. 11, s. 3, as being "civil officers whom it concerned to prosecute."—*Reg. v. East Waldegrave*, 1 G. & D. 615.
3. (*Taxation—Costs of witnesses.*) In an action against a sheriff for not arresting, and for an escape, the plaintiff having withdrawn the record, the master, in taxing the costs of the day, allowed the costs of two sheriff's officers to whom the writ had been directed, and who had been in attendance as witnesses. The Court refused to grant a rule to review the taxation, which was sought for on the ground that the parties were incompetent witnesses.—*Curling v. Evans*, 2 Man. & G. 349.
4. (*On several issues.*) Where a defendant pleads several pleas, and one of them, which is an answer to the action, is found for him, and others for the plaintiff, the latter is entitled to the costs of the issues found for him, including a portion of the briefs and counsel's fees. (2 D. P. C. 456.)—*Hazelwood v. Back*, 1 D. P. C. (N. S.) 94.
5. (*Certificate under 3 & 4 Vict. c. 24.*) The Court has no jurisdiction to review the discretion exercised by a judge at nisi prius in granting a certificate to entitle the plaintiff to costs, under the stat 3 & 4 Vict. c. 24, s. 2.—*Barker v. Hollier*, 8 M. & W. 513; 1 D. P. C. (N. S.) 32.
6. (*Of declaration in actions on bills and notes.*) The directions to taxing officers, authorizing them in cases to which the rule of T. T., 1 Will. 4, for shortening declarations, is applicable, to allow 1*l.* 18*s.* for the declaration, do not extend to cases in which more than one action is brought on the same bill or note; but in such case the taxing officer is to allow according to the length of the declaration.—*Cripps v. Field*, 8 M. & W. 659.
7. (*Certificate under 3 & 4 Vict. c. 24, when in time.*) On the execution of a writ of inquiry in trespass, the jury having assessed the damages at one farthing, the under-sheriff was applied to to certify, under the stat. 3 & 4 Vict. c. 94, s. 2, that the trespass was wilful and malicious. He said that the trespass was wilful, but he would take time to consider whether he would certify that it was malicious. The Court then adjourned, and on the same day, at 5 p. m., met again to take an inquisition under an *elegit*: Held, that a certificate given by the under-sheriff pursuant to the act, on the same day, but after the Court had so met again, was valid. (8 M. & W. 281.)—*Page v. Pearce*, 8 M. & W. 677.

#### COURT OF REQUESTS ACTS.

The acceptance by a plaintiff of a smaller sum paid into Court, in satisfaction of his demand, is not of itself evidence that no more was due, so as to entitle the defendant to enter a suggestion under the Court of Requests Acts.

The form of the plea of payment of money into Court does not preclude a defendant from applying to enter a suggestion to deprive the plaintiff of costs. (5 D. P. C. 170; 5 M. & Selw. 196.)—*Jorden v. Berwick*, 1 D. P. C. (N. S.) 102.

#### COVENANT.

1. (*To leave erections and improvements—Parol agreement to discharge covenant.*)

To an action of covenant upon an indenture of lease in which the defendant as lessee covenanted to keep in repair, and to yield up at the expiration of the term, all erections and improvements that should during the term be erected, made, or set up in or upon the demised premises—the defendant pleaded an agreement by parol between the lessor and one Hicks, to whom the defendant's term in the premises came by assignment, whereby the lessor promised and agreed, that, if Hicks would erect a greenhouse upon the demised premises, he (Hicks) should be at liberty to pull down and remove such greenhouse at the expiration of the term, provided that no injury was thereby done to the premises. The jury having found the plea to be true in fact: Held, that it was bad in law, inasmuch as it attempted to set up a parol agreement in answer to an action on a covenant under seal; and that the plaintiff was entitled to judgment thereon non obstante veredicto. (8 Rep. 891, a.)—*West v. Blakeway*, 3 Scott, N. R. 199.

2. (*For quiet enjoyment, on grant of licence to sport over lands—Pleading—Oyer.*)

The defendant demised to the plaintiff, for twenty-one years, a mansion-house and land, with the sole licence of shooting and sporting over all other the lands, plantations, and coverts of the defendant, subject to the liberty for each tenant on his farm to kill rabbits with ferrets only. The defendant covenanted for quiet enjoyment, and that if, at any time during the term, any of the tenants of the defendant of any such lands, plantations, coverts, &c., should obstruct the plaintiff in the enjoyment of the said licence, or should destroy the game, rabbits, &c., then the defendant would, upon the requisition of the plaintiff, give notice to quit to such tenants, and enforce the notice by such legal measures as should be necessary. Breach, that, after the demise to the plaintiff, the defendant demised to T. R. for the term of twelve years, one hundred acres of the plantations on which the exclusive right of killing rabbits had been granted to the plaintiff, without any clause in the demise to prevent the said T. R. from obstructing the plaintiff in the enjoyment of the said licence, or from destroying rabbits, and without reserving to the defendant the power of giving T. R. notice to quit, or of enforcing such notice by such legal measures as should be necessary, the said plantations not being at the time of the demise to the plaintiff parcel of any farm; and that the said T. R. did afterwards kill and destroy divers rabbits. The defendant in his plea set out the lease on over, which contained, amongst other things, the demise of certain lands and pools, “for the better description whereof a plan is indorsed on the second skin of these presents:”—the plan was not set out on over. The defendant then pleaded, that the said rabbits so killed by T. R. were killed by him on his own farm with ferrets only: Held, on demurrer to the plea, that the exception as to killing rabbits extended, not only to farms existing at the time of the demise to the plaintiff, but also to farms subsequently created.

Held, also, that the declaration was bad, as not containing any breach, the demise to T. R. not constituting any breach of the defendant's covenant.

*Semble*, that it was not necessary to set out on over the plan referred to in the indenture.—*Newton v. Wilmot*, 8 M. & W. 711.

## DEBTOR AND CREDITOR.

1. (*Composition deed—Reservation of rights to particular creditor—Pleading.*)

Covenant. The declaration alleged, that the defendant, by certain articles of agreement under seal, (which recited that one R. M'G. had opened an account with the plaintiffs, a banking company), covenanted and agreed to guarantee and be accountable for the due payment of all sums of money which then were or



thereafter should become due to the plaintiffs from R. M'G., by reason of any money, &c., then advanced or owing, or thereafter to be advanced or owing on the banking account from the said R. M'G., stating that such guarantee was limited to £500, and was to be a continuing guarantee, and providing that in case of bankruptcy or insolvency, not only the £500 should be paid to the plaintiffs by the defendant, but that the plaintiffs should be at liberty to apply the whole of the dividends receivable on their whole debt in discharge of the part not guaranteed; that the sum of 599*l.* 13*s.* 4*d.* became and was and still is due upon the advance of monies by the plaintiffs to R. M'G., yet that R. M'G. did not pay the same, and thereby the defendant became liable to pay the sum of £500, the amount of his guarantee. To this the defendant pleaded, secondly, that no part of the sum of 599*l.* 13*s.* 4*d.* was due or owing from the said R. M'G. to the plaintiffs on the said banking account, modo et formâ. Another plea was, that, after the accruing of the debt of R. M'G. to the plaintiffs, he was indebted to them in 1100*l.*, of which the sum of 599*l.* 13*s.* 4*d.* was parcel, and was also indebted to other persons in large sums of money, and was in bad and insolvent circumstances, and unable to pay the plaintiffs and his other creditors their debts in full, and that thereupon he agreed with the plaintiffs and his other creditors to pay, and the plaintiffs and the other creditors mutually agreed with each other and with the said R. M'G. to accept from him, a composition of 10*s.* 6*d.* in the pound, as a composition in full discharge of the said respective debts; and the plea then stated the payment by R. M'G. of the composition to the plaintiffs. Replication, that the plaintiffs entered into the composition with the knowledge of the defendant, and upon the agreement that it should not discharge the defendant from his liability upon the guarantee: which was denied by the rejoinder.

At the trial, the facts stated in the replication were found by the jury, and the learned judge told them that under those circumstances they ought also to find the second issue for the plaintiffs, which they accordingly did.

Held, that the second plea amounted to a denial that there was any originally existing debt, and not of a debt being due at the commencement of the suit.

Held, also, on a rule to arrest the judgment, that the replication to the fourth plea was good, inasmuch as it did not appear that the reservation of the plaintiffs' right against the defendant was unknown to the other creditors.—*Davidson v. M'Gregor*, 8 M. & W. 755.

2. (*Right of creditor over title deed deposited with him.*) Where a debtor deposits a title deed with his creditor, as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person.—*Hobson v. Mellond*, 2 M. & Rob. 342.

#### DEMURRAGE.

Indebitatus assumpsit will not lie for demurrage, unless there be an express contract to pay it.—*Horn v. Bensusan*, 2 M. & R. 326.

DETINUE. See PLEADING, 1.

#### DEVISE.

1. (*Vested remainder.*) A testator, possessed of a certain freehold, duchy or copyhold, and leasehold estates, and having three sons, Hugh, John Morgan, and Edwin, devised all his property to his widow and his son Edwin, upon trust, in the first place, to permit and suffer his widow to receive the rents and profits for life, should she remain unmarried, and from and after the decease or future

marriage of his widow, then (subject to the reservations and charges thereafter contained) as to all his freehold and duchy or copyhold and leasehold estates, to the use of his three sons, to be equally divided between them as tenants in common for ever; and he directed that in case of a future marriage of his wife, and if she should again become a widow, the rents and profits of a certain duchy or copyhold estate should from thenceforth during the remainder of her life belong and be paid to her own use and benefit; and he declared his further will to be, that, if at any time within three years next after the decease or future marriage of his widow, his eldest son, Hugh, should be desirous to have the whole of the estates before devised unto and among him and his brothers, upon his paying 1000*l.* to each of them within that period for such their shares and interest therein, the same should become the sole and exclusive property of Hugh: and after giving certain legacies to his daughters, which with debts were charged upon his freehold property in the event of his personalty being insufficient, he proceeded thus—"I further direct, that, should my eldest son die without issue, then I give and devise unto my second son John Morgan, all those my freehold and duchy or copyhold estates aforesaid, and in case he should have no issue, then to my youngest son, Edwin, and his issue—his heirs and assigns for ever."

The testator died (his wife and his three sons surviving him), leaving sufficient personal estate to pay all his debts and legacies. Hugh, the eldest son, died intestate, without having had any issue, leaving his mother (still a widow) and his two brothers him surviving:—Held, that he died devisee of the remainder in fee of one third part of the freehold and duchy or copyhold land devised by his father's will, expectant on the death or second marriage of his mother, subject to the contingent interest of his mother in the duchy or copyhold estate in the event of her marrying and again becoming a widow: and he died possessed of the absolute estate in remainder in one third part of the leasehold estates devised by the said will, expectant on the death or second marriage of his mother.—*Ley v. Ley*, 3 Scott, N. R. 161.

2. (*What passes mortgaged premises.*) Under a devise of all the testator's real and personal estate, "after payment of his just debts and funeral expenses," lands mortgaged in fee to the testator do not pass.—*Doe d. Roylance v. Lightfoot*, 8 M. & W. 553.

**DISTRESS.** See **BANKRUPTCY**, 3.

#### **ECCLESIASTICAL COURT.**

(*Writ de contumace capiendo—Form of Significavit—Citation.*) A writ de contumace capiendo, under the stat. 53 G. 3, c. 127, s. 1, for disobeying a monition of the Arches Court, may issue on a significavit from the official principal.

If the writ purport to have issued against the defendant for non-payment of a sum of money and costs, according to the monition of the Arches Court, the proceedings being carried on in pain of the contumacy of the defendant, duly cited to appear in the cause, &c., with the usual intimation, but not appearing, the Court of Q. B. will not discharge him on habeas corpus; for a practice of the Ecclesiastical Court to give judgment against a party on such non-appearance may be legal; and if no such practice exists, the party should appeal.

The writ sufficiently shews that the Ecclesiastical Court had jurisdiction, if it states that the defendant was contumacious in not paying the churchwardens of, &c., the sum of 2*l.* 5*s.*, rated and assessed upon him, and costs, pursuant to a monition, &c., "in a certain cause or business of subtraction of church-rates," depending, &c.



the occupiers of land to repair a road *ratione tenuræ*.—*Reg. v. Inhabitants of Wavertree*, 2 M. & Rob. 353.

4. (*Secondary evidence—Notice to produce.*) Where a document is called for after notice to produce by the plaintiff, the defendant may during the plaintiff's case produce evidence to shew the document lawfully out of his possession, and such evidence is solely for the judge to determine whether secondary evidence be admissible, and gives the plaintiff's counsel no reply to the jury.—*Harvey v. Mitchell*, 2 M. & Rob. 366.
5. (*Deposition of witness on interrogatories.*) The deposition of a witness examined on interrogatories are admissible, though it appears on his examination he referred to papers which he refused to allow the commissioners to see.—*Steinkeller v. Newton*, 2 M. & Rob. 372.
6. (*Of bad character of plaintiff.*) In trespass for false imprisonment on a criminal charge, the defendant cannot cross-examine as to the bad character of the plaintiff, nor as to the previous charges made against him.—*Downing v. Butcher*, 2 M. & Rob. 374.
7. (*Ancient document.*) In an action to try whether the queen, in the right of the Duchy of Lancaster, has the right to appoint coroners for the duchy, the plaintiff insisting that in former times an officer of the duchy called the feodary discharged the duties of coroner: Held, that a manuscript book written by one J. S. (a feodary in the reign of Queen Elizabeth) and purporting to contain an account of the duties of his office, and precedents relating thereto, was not receivable in evidence for the plaintiff, who claimed to be duchy coroner, although such book had been kept in the duchy office, and referred to there as a book of authority.—*Jewison v. Dyson*, 2 M. & Rob. 377.
8. (*Deposition of witness on interrogatories.*) In order to let in the depositions of a witness examined on interrogatories, his absence must be shown by some one who can speak to the fact of his own knowledge—proof of enquiries made at the residence of the witness and of answers given is not enough.—*Robinson v. Markis*, 2 M. & Rob. 375.
9. (*Notice to produce.*) A notice to produce all letters written by the one party to and received by the other, between the years 1837 and 1841 both inclusive, held sufficient to call for a particular letter.—*Morris v. Hauser*, 2 M. & Rob. 392.
10. (*Admissibility of decree of Ecclesiastical Court.*) A decree of the Court of Arches for alimony is not admissible in evidence without proof of the proceedings in the suit.  
Where a suit is removed by appeal from the Consistory Court to the Court of Arches, the judgment of the Court of Arches is not admissible in evidence without showing that court to be duly in possession of such suit, by producing the process of appeal, viz. the transcript of the proceedings sent from the court below.—*Leake v. Marquis of Westmeath*, 2 M. & Rob. 394.
11. (*Deposition of witness on interrogatories.*) The deposition of a witness examined on interrogatories jointly interested with the defendant may be read in evidence for the defendant, the name of the deponent being indorsed on the record under stat. 3 & 4 W. 4, c. 42, s. 27.—*Adams v. Garrard*, 2 M. & Rob. 400.

## EVIDENCE IN CRIMINAL CASES.

1. (*Confession.*) A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two of the rooms was on fire, and a

spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her: Held, that this was such an inducement to confess as would render inadmissible any statement made by the prisoner respecting the fire, the whole being one transaction.—*Reg. v. Hearn*, 1 Carr. & M. 109.

#### EXECUTION.

(*What may be levied as "incidental expenses."*) A judge's order was drawn up by consent, that upon payment of the debt and costs on a certain day, all further proceedings should be stayed; but in default of payment, the plaintiff should be at liberty to sign judgment, issue execution, and levy the debt and costs, together with the costs of execution, sheriff's poundage, officers' fees, and all other incidental expenses. Default having been made, and execution issued: Held, that the sheriff could not levy, nor was the defendant liable to pay, as incidental expenses, the costs of a rule to return the writ.—*Hutchinson v. Humbert*, 8 M. & W. 638; 1 D. P. C. (N. S.) 78.

#### FIXTURES.

(*What are removable as between landlord and tenant.*) A lessee covenanted to yield up in repair at the expiration of his term all *erections and improvements* which should be erected, made, or set up, during the term upon the demised premises. An assignee having during the term erected a greenhouse, the framework of which was not otherwise fixed to the walls thereof than by being laid thereon embedded in mortar: Held, that the removal of the sashes and framework was a breach of the lessee's covenant, though no damage was done to the premises, and the walls and flues were left in a perfect state.—*West v. Blakeway*, 3 Scott, N. R. 218.

#### FORGERY.

(*Of promissory note—Indictment.*) An indictment under statute 11 Geo. 4 and 1 W. 4, c. 66, for uttering a forged foreign promissory note, need not allege it to be payable out of England.—*Reg. v. Lee*, 2 M. & Rob. 281.

And see **BILLS AND NOTES**, 9.

**FREIGHT.** See **PRINCIPAL AND AGENT**.

#### GUARANTEE.

(*Construction of—Composition deed.*) C. & Co., being insolvent, compounded with their creditors, by agreeing to pay them a composition of 7s. 6d. in the pound at three instalments, and execute a conveyance of their real and personal estate to the defendants, in trust to permit them, C. & Co., to carry on the business, subject to the control of the defendants, and to pay thereout to the creditors the said three instalments; and in case of full payment thereof, to re-convey and re-assign the estate to C. & Co., but upon default of such payment, then in trust to sell, and after deducting out of the proceeds interest, costs, and amount of mortgages, &c., to divide the remainder amongst themselves and the other creditors. C. & Co. continued accordingly to carry on the business, and opened an account with a banking company, from whom they obtained large advances. The bank applied to and obtained from the defendants the following guarantee:—"C. & Co. having assigned over all their real and personal estate to us, in trust for securing a composition of 7s. 6d. in the pound to their several creditors executing such deed, and it being necessary to open a banking account for the purpose of carrying on the said trade, in order that the stock and goods on hand may be wrought up and converted into money for the purpose of paying such dividends; and you having,

at our request, consented to open a banking account on the credit of the names of the said C. & Co., or of any person or persons for the time being carrying on that concern; we do hereby promise and engage, that any sum or sums of money to become due to you or to the said banking company, in respect of such account, shall, in the first instance, be paid to you out of the net proceeds of the said trust estate, so far as the same will extend to pay." Further advances were made by the bank to C. & Co. subsequent to this guarantee. The defendants subsequently sold the property of C. & Co. under the provisions of the composition deed, and the proceeds were insufficient to pay the creditors the composition of 7s. 6d. in the pound: Held, that the meaning of the guarantee was not that the defendants should be liable to the bank only out of the proceeds realized from the estate of C. & Co., after payment of the composition of 7s. 6d. to the creditors, but that they were liable in the first instance to repay out of the proceeds the whole amount of the advances made by the bank to C. & Co., as well before as after the guarantee.—*Wilson v. Craven*, 8 M. & W. 584.

### HIGHWAY.

1. (*Indictment against township for non-repair.*) An indictment charging a township with a customary liability to repair *all* roads within the township, and not limiting the liability to such roads as but for the custom would have been repairable by the parish: Held, good (on motion in arrest of judgment,) on the ground that there might be such a custom as alleged, and that if there were any roads repairable *ratione tenuræ* or otherwise, it was for the defendants to show it as a matter of evidence.—*Reg. v. Inhabitants of Heage*, 1 G. & D. 518.
2. (*Authority of surveyor to cut hedges.*) By 5 & 6 Will. 4, c. 50, s. 65, "if the surveyor shall think a carriage or cartway, &c., prejudiced by the shade of any hedges, and that the sun and wind are excluded from such highway, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for one justice, &c." to summon the owner of the hedges at a special sessions "to show cause why the said hedges are not cut, &c., in such manner that the carriageway &c. shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway &c. to the damage thereof, or why the obstruction caused in such carriageway &c. should not be removed, &c., and if such justices shall order that such hedges shall be cut, &c., in manner aforesaid, or such obstruction removed," and the owner shall not comply within ten days, he may be convicted and fined, and the surveyor may himself cut the hedges.

In trespass for cutting the plaintiff's hedge, a surveyor justified under the act, because the plaintiff had failed to comply with the order, reciting that the plaintiff had neglected to cut his hedge "whereby the sun and wind were excluded from the carriage way, &c. to the damage thereof, and whereby also obstructions were caused therein," and ordering to cause the said hedges to be cut, and the said obstruction to the damage of the said highway to be removed, &c.: Held, that the order was bad in substance, and did not justify the surveyor; because it required the plaintiff to cut his hedge generally, without specifying the manner in which it was to be done.—*Brook v. Jenney*, 1 G. & D. 567.

3. (*Indictment for non-repair—Evidence of—Highway.*) An indictment for a non-repair of a highway, describing the way as immemorial, is not supported by proof of a highway extinguished as such sixty years before by an enclosure

And see LARCENY; SEPARATION DEED.



## INDICTMENT.

1. (*Conclusion contra pacem.*) An indictment charging an offence within the present reign, and concluding against the peace of her majesty, is not supported by proof of an offence on a day in a former reign; and the objection entitles the prisoner to an acquittal. (2 M. & Rob. 109.)—*Reg. v. Pringle*, 2 M. & Rob. 276.
2. (*For murder—Name of child—Conviction for concealment of birth.*) On an indictment for child murder, bad for not stating the name of the child, or accounting for the omission, no conviction for concealing the birth can take place.—*Reg. v. Hicks*, 2 M. & Rob. 302.
3. (*For stealing in a dwelling-house.*) An indictment stating that the prisoner, "forty pieces of the current gold coin, &c. in the same dwelling-house then and there being found, then and there (not repeating "in the same dwelling-house,") feloniously did steal," &c., is sufficient.—*Reg. v. Andrews*, 1 Carr. & M. 121.
4. (*For rape—Charge of aiding and abetting.*) An indictment is good which charges that A. committed a rape, and that B. was present aiding and assisting him in the commission of the felony. In such a case the party aiding may be charged either as he was in law, a principal in the first degree, or as he was in fact, a principal in the second degree.—*Reg. v. Crisham*, 1 Carr. & M. 187.

And see CONCEALMENT OF BIRTH, 1; COSTS, 2; FORGERY.

## INFERIOR COURT.

(*Writ of false judgment—Particulars of demand—Cause of action, when sufficiently shown to be within inferior jurisdiction—Costs.*) In an action in the County Court the declaration stated that the defendant, on and at, &c. within the jurisdiction of the County Court, was indebted to the plaintiff in 1*l.* 19*s.* 6*d.* for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at his request, and in the sum of 1*l.* 19*s.* 6*d.* for money found to be due from the defendant to the plaintiff on an account then and there stated between them, which said several sums were to be respectively paid by the defendant to the plaintiff on request; whereby, &c. an action hath accrued to plaintiff to demand and have of and from the defendant the said several sums respectively, amounting to the sum of 1*l.* 19*s.* 6*d.*: yet the defendant hath not paid the said sums above demanded, or any part thereof, to the damage of the plaintiff of 1*l.* 19*s.* 6*d.* The particulars of demand stated a series of items, amounting to 3*l.* 11*s.* 6*d.*, but gave credit for 1*l.* 12*s.* 10*d.*, reducing the plaintiff's demand to 1*l.* 18*s.* 8*d.*: Held, on a writ of false judgment, that the declaration sufficiently stated the cause of action to have arisen within the jurisdiction of the Court, and that the defendant having appeared it was unnecessary to state that he resided within the jurisdiction: but that the declaration was bad, as claiming two sums of 1*l.* 19*s.* 6*d.* each, and so raising the amount of the demand above 40*s.*, and that the Court would not take the particulars of demand into their consideration for the purpose of ascertaining the amount really sought to be recovered by the plaintiff. Held also, that the plaintiff, intending to claim the balance of an account which had originally amounted to more than 40*s.*, but had been reduced by payments, should have set out the original debt in the declaration, and have admitted a portion of it to have been paid, so reducing the claim below 40*s.*

In the above declaration the defendant pleaded to the jurisdiction, and the plaintiff replied that the cause of action was correctly set forth, whereupon issue was joined. The County Court gave judgment for the defendant as follows —“ Therefore it was considered by the said Court that the defendant recover of the plaintiff his costs and charges by him expended in and about the said suit of the plaintiff.” Held, that this being merely a judgment for costs, must be reversed, and the Court directed the judgment to be drawn up, that the plaintiff be barred from further proceedings in the County Court, and ordered that the judgment being on a plea in abatement, the matter of fact not having been tried, the defendant should not have any costs.—*Dempster v. Parnell*, 1 D. P. C. N. S., 112.

### INSOLVENT.

(*Liability of, as surety for old debt.*) The defendant being indebted to the plaintiff in 42*l.* as the acceptor of a bill of exchange, of which one Palmer was the drawer, obtained his discharge under the Insolvent Debtors' Act. Palmer was afterwards sued to judgment and taken in execution. In order to procure Palmer's discharge, the defendant gave the plaintiff a warrant of attorney for a sum which included the balance of the debt and costs for which Palmer was in custody, and also certain costs which the plaintiff had incurred in opposing the defendant's discharge under the act. The defendant having been taken in execution under this warrant of attorney, and paid the amount to procure his release: Held, that he was entitled to relief as to so much of the debt levied under the warrant of attorney as represented the original debt of 42*l.*, but not as to so much as represented the costs of opposing his discharge under the act, or those of the action against Palmer. (1 C. M. & R. 85; 7 M. & W. 143.)—*Collins v. Beaton*, 3 Scott, N. R. 185.

### INSURANCE.

(*Total loss—Repairing stranded vessel—Abandonment.*) The ship *Eliza* (Dutch built) valued at 8,000*l.* was insured at and from Rotterdam to Java and Sumatra and back again to a port in Holland. In the course of her voyage she was stranded on the Goodwin Sands and plundered. She was afterwards removed, and ultimately brought to London, and notice of abandonment given to the underwriters. It appeared that just before the *Eliza* was cast away, she was worth 5,833*l.*; that her value as she lay was 700*l.*, and that the salvage was 490*l.* It was proved by English witnesses, that the expenses of repairing the ship in England would be 4,615*l.*; that if she had been entitled to a British register, she would have been worth when repaired from 4,500*l.* to 4,700*l.*; and that if she had been a British ship, it would have been prudent for a British owner to repair her. It was proved by the Dutch witnesses, that the expense of repairing her in Holland would have been far greater, and that her value when repaired in Holland would not have exceeded 2,915*l.* It was also proved that the trading companies in Holland will not employ a vessel that has been stranded in the manner in which the *Eliza* was stranded, however perfectly she might have been repaired, and that this circumstance would affect her value in Holland. The judge, in his summing up, told the jury, that in considering whether this was a case of a partial or total loss, they ought not to take into account the value in the policy; and that in considering the same question, they ought to look at all the circumstances attending the ship, and to judge whether under all those circumstances a prudent owner, if uninsured,

would have declined to repair the ship ; and, if so, they might find it a case of total loss. To this direction the defendant tendered a bill of exceptions : Held, that the direction was correct.—*Young v. Turing*, 2 Scott, N. R. 752.

2. (*On life—Concealment of material facts.*) 1. A party whose life is insured is not the general agent for the assured ; and therefore the policy is not void by reason that such party failed to communicate a material fact, as to which he was not interrogated by the insurers, unless he was aware of the materiality of the fact, and studiously concealed it. 2. It is a question of fact for the jury, whether a fact not communicated, was, under the circumstances, one which the assured ought to have communicated. 3. Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence of it, he is entitled to begin.—*Rawlins v. Desborough*, 2 M. & Rob. 328.
3. (*Assignment of life policy, when void.*) A policy of insurance on the life of A. had been assigned to the plaintiff: the defendant having privately ascertained that A. was dangerously ill, treats with the plaintiff for the purchase of the policy for a small sum, representing it as the then value of the policy, the plaintiff not being aware of A.'s illness : Held, that the sale was void, and that the plaintiff might recover the value of the policy in an action of trover.—*Jones v. Keene*, 2 M. & Rob. 348.

#### INTERPLEADER ACT.

Where seizure by the sheriff under a fi. fa. is disputed on the ground that the goods on which the levy has been made were held by the defendant not in his own right, but merely as executor in trust for others, the defendant is to be considered as “not being the party against whom the process issued,” and the sheriff may apply for an interpleader rule under 1 & 2 Will. 4, c. 58, s. 6.—*Fenwick v. Laycock*, 1 G. & D. 532.

#### JOINT STOCK BANKING COMPANY.

1. (*Declaration by.*) A declaration at the suit of a public officer of a banking co-partnership, under the 7 Geo. 4, c. 46, must state that the co-partnership is carrying on the business; an allegation that they are united for the purpose of carrying on business is bad on special demurrer.—*Fletcher v. Crosbie*, 1 D. P. C. (N. S.) 149.
2. (*Action by—Change of name.*) In 1833 a joint stock bank was established, under the provisions of the stat. 7 Geo. 4, c. 46, by the name of the Mirfield and Huddersfield District Banking Company. In 1836 H. & Co., bankers, relinquished their business in favour of and all took shares in this company : and it was subsequently agreed that the title of the bank should thenceforth be The West Riding Union Banking Company ; that the capital should be increased by the creation of new shares ; and that additional directors should be appointed : Held, that the public officer of the West Riding Union Banking Company might, notwithstanding the change of name, and the accession of new proprietors, maintain an action on a guarantee given to the Mirfield and Huddersfield District Banking Company before their junction with H. & Co., for advances made by them.—*Wilson v. Craven*, 8 M. & W. 584.

And see LIMITATIONS, STATUTE OF.

#### LANCASTER COURT OF COMMON PLEAS.

An affidavit in support of an application to issue execution on a judgment obtained in the Court of Common Pleas at Lancaster, under the 4 & 5 Will. 4,

c. 62, must pursue the language of the 31st section, and should be entitled in the court in which the application is made.—*Wigden v. Birt*, 1 D. P. C. (N. S.) 93.

#### LANDLORD AND TENANT.

(*Right of tenant to dispute landlord's title.*) The defendant demised premises to the plaintiff, who paid rent regularly for them for some years to the defendant; disputes having arisen between the defendant and a third party as to the rightful ownership of the demised premises, it was agreed to abide by a case to be submitted to a barrister, who gave his opinion in favour of the third party; whereupon the plaintiff, being informed of the decision, paid his rent to the third party. The defendant distrained for rent due after the decision, and the plaintiff pleaded the facts above stated: Held, that it was a question for the jury, whether the defendant by his acts had not admitted that his title was at an end, and consequently had no right to distrain.—*Downs v. Cooper*, 1 G. & D. 573.

And see PLEADING, 5; USE AND OCCUPATION.

#### LAND TAX.

The plaintiffs demised certain premises to the defendant for a term of years at a certain rent, with a covenant on the part of the lessee "at his own charge to pay all parliamentary, parochial and other taxes, tithes, and assessments then or thereafter to be issuing out of all or any the said thereby demised premises, or chargeable upon the landlords or tenants thereof for the time being in respect thereof:" Held, that land-tax which had been redeemed or purchased by a former lessee of part of the premises, under the provisions of the 42 Geo. 3, c. 116, was a "parliamentary assessment" within the meaning of the covenant.—*Governors of Christ's Hospital v. Harrild*, 3 Scott, N. R. 126.

#### LARCENY.

(*From husband, by delivery of wife.*) Where goods of the husband are taken away by his wife and another person, with an intent that the wife should elope and live in adultery with that person, this is a larceny.—*Reg. v. Tollett*, 1 Carr. & M. 112.

#### LEASE.

(*Proviso for re-entry.*) Ejectment was brought on the following proviso for re-entry in a lease, "that if the said lessee (the defendant), his executors, administrators, or assigns shall either by their or his own act or acts, or by bankruptcy, insolvency, writ of extent, or execution by fieri facias, or other act of law, or by any other means whereby either voluntarily, or without his or their consent, whereunder the said premises hereby demised or any part thereof would, in case that proviso did not exist, be liable to be seized by the sheriff or any other person; or in case the said lessee, his executors, administrators, or assigns shall at any time or times hereinafter make breach or default in performance of the covenants or any of them hereinbefore on his or their parts contained," then the lease was to be void, and the lessor to re-enter: Held, that the proviso was insensible.—*Doe d. Wyndham v. Carew*, 1 G. & D. 640.

#### LIBEL.

(*In Newspaper—Evidence in mitigation of damages.*) In an action against the

editors of a newspaper for libel, the fact of the libel being published on the communication of a correspondent is not admissible in mitigation of damages.—*Talbutt v. Clark*, 2 M. & Rob. 312.

## LICENCE.

(*Over land, when implied, and whether revocable.*) A licence is not implied by law to the purchaser of goods, (though sold under an execution or distress,) to enter upon the premises of the former owner and take them away, although they have remained there with his assent. To support a plea of leave and licence to an action of trespass for taking away goods under such circumstances, there must be proof of an express agreement that the purchaser should enter on the premises and take the goods. (11 Ad. & E. 34.)

*Quære*, whether there can be an irrevocable licence to enter upon land, without its amounting to an interest in land, which therefore can pass only by deed.—*Williams v. Morris*, 8 M. & W. 488.

LIMITATION ACT. See MORTGAGOR AND MORTGAGEE, 2.

## LIMITATIONS, STATUTE OF.

(*When it begins to run.—Guarantee, construction of.*) In 1816, G. shipped goods on board a vessel chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & Co., who were to dispose of the outward cargo there, and send the proceeds in goods or bills to B. & Co. in London, who were to reimburse themselves their charges and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in 850*l.* the defendants and G. applied to B. & Co. to pay off this debt by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guarantee:—"Messrs. B. & Co.—You having expressed some doubts of the propriety of paying G.'s draft on you for 850*l.* in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. & Co. thereupon accepted and paid a bill for 850*l.* drawn by G. on them in favour of the defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner, (G. having become bankrupt), gave notice to the East India Company, (in whose docks she lay), not to deliver any part of the cargo without his authority; they thereupon sold the cargo, and paid the owner's demand for freight, and, in consequence of conflicting claims from G.'s assignees and from B. & Co., filed an interpleader bill, and paid the balance of the proceeds into court. Proceedings at law and equity were continued between all the above parties, under legal advice, up to the year 1837, when the result was, that B. & Co. were obliged to pay C.'s costs. In 1838, B. & Co. demanded of the defendants the 850*l.* due by the guarantee, with interest, and their share of the expenses incurred in the law proceedings, and on their refusal to pay, brought an action against them on the guarantee: Held, first, that the Statute of Limitations began to run against the plaintiffs, not from the termination of the legal proceedings in 1837, but from the return and sale of the cargo in 1818, when all the facts were ascertained upon which the defendants' legal liability depended, and therefore that it was a bar to the action; secondly, that the defendants

could not be made liable, under the guarantie, for the expenses incurred by the plaintiffs in the law proceedings.—*Colvin v. Buckle*, 8 M. & W. 680.

LUNATIC. See SETTLEMENT, 2.

## MAINTENANCE.

(*Action for, when maintainable by joint plaintiffs—Form of count—Conclusion contra formam statuti.*) Declaration in case stated, that before and at the committing of the grievances by the defendants, an action of trespass had been commenced and was depending, wherein R. H. was plaintiff and the now plaintiffs were defendants; in which action the now plaintiffs appeared by P. M., then being their attorney in that behalf, and the said action was defended by the now plaintiffs by and through the said P. M. as such attorney; and charged, that the defendants, contriving, &c., wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said action on the part of the said R. H. against the now plaintiffs; by reason whereof the now plaintiffs have been greatly injured, prejudiced and aggrieved in and about their defence in the said action, and have incurred and been obliged to pay divers large sums of money, amounting, &c., in and about their defence of the said action so by them made through the said P. M., so being their attorney in that behalf. At the trial, the jury found a verdict for the plaintiffs for the amount only of the bill of costs paid by them to P. M. as their attorney in the former action, and the verdict was entered upon the postea accordingly: Held, on motion in arrest of judgment, that the action was maintainable jointly by the plaintiffs; the expenses of the defence in the former action, to which the verdict was confined, being a joint and not a several damage.

A declaration in case for maintenance need not charge the maintenance to have been committed *contra formam statuti*, it being a wrongful act at common law, and the statutes relating to maintenance being only declaratory of the common law, with additional penalties.

Nor need the declaration allege that the defendant was not interested in the action maintained; if he was, that is a matter to be pleaded by him.

A count in case, charging that the defendant unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit therein mentioned, instigated and stirred up A. B., a pauper, to commence and prosecute an action against the plaintiff, by reason whereof A. B. did commence and prosecute such action, &c., whereby the plaintiff was put to great trouble and vexation, and obliged to lay out a large sum in the defence of such action, is good.—*Pechell v. Watson*, 8 M. & W. 691.

## MALICIOUS PROSECUTION.

1. (*Province of judge and jury.*) In an action for a malicious prosecution, though in it the question of reasonable or probable cause depends, not upon a few and simple facts, but upon facts which are numerous and complicated, and upon numerous and complicated inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge.—*Panton v. Williams* (in error), 1 G. & D. 504.

2. (*Evidence of malice.*) In a case for maliciously indicting the plaintiff, the

observations made by the judge on the trial of the indictment are not evidence for the plaintiff.—*Barker v. Angell*, 2 M. & Rob. 371.

### MANDAMUS.

(*To gaoler, to deliver up body of debtor for burial.*) The Court, on motion, directed a mandamus to go peremptorily in the first instance, commanding a gaoler to give up for burial the body of a debtor dead within the gaol, it being sworn that he refused to do so until a certain sum he claimed, as a debt owing by the deceased for maintenance, were paid.—*In re the Balliff of Wakefield*, 1 G. & D. 566.

### MINING COMPANY.

(*Liability of shareholder in.*) A joint stock company was formed to work a mine, in which the defendant became a shareholder, and took part in its proceedings. The prospectus issued on the formation of the company stated, that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred; and the scrip certificates also bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine, on the order of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns: Held, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificate, unless it were shown that the agent had in fact no authority from the defendant, and that the plaintiff had notice thereof. (6 M. & W. 461.)—*Hawker v. Bourne*, 8 M. & W. 703.

### MORTGAGOR AND MORTGAGEE.

1. (*Right of entry of mortgagee.*) A tenant for years of a house demised it, by indenture of mortgage, dated March 24th, to the mortgagee, to hold thenceforth for the residue of the term (less one day), subject to the proviso therein-after mentioned, and he also sold and transferred the fixtures and chattels therein to the mortgagee, to hold for his own use and benefit, but subject to the proviso thereafter contained. The deed contained a proviso for reconveyance, on payment of the mortgage money on the 24th June then next, and also a proviso that on non-payment on that day, it should be lawful for the mortgagee to enter upon, and receive and take the rents and profits of the said leasehold and other premises, and, if he should think proper, of his sole authority to sell or underlet the premises, and to sell the fixtures and chattels: Held, that the mortgagee's right to take possession did not attach until the 24th June, and that he could not maintain trespass for an entry, or for an asportavit of the fixtures and chattels before that day by a stranger.—*Wheeler v. Montefiore*, 1 G. & D. 493.

2. (*Estate of mortgagor—Limitation Act.*) By deeds of lease and release, dated 7th and 8th September, 1819, lands were mortgaged in fee, subject to a proviso, that if the mortgagor should well and truly pay the principal money and interest on the 25th day of March then next, the mortgagee, his heirs and assigns, should and would reconvey and reassure the mortgaged premises to the mortgagor, his heirs and assigns. There was also a covenant that it should be lawful for the mortgagee, his heirs and assigns, from time to time and at all times after default should be made in the payment of the principal money and interest, contrary to the proviso aforesaid, peaceably and quietly to enter into, have, hold, occupy, possess, and enjoy the said premises: and also a covenant by the mortgagor for further assurance in case of such default: Held, that the mortgagee had the right of possession, under this deed, from the time



of its execution, and not merely from the 25th March, 1820: and therefore, that an ejectment for the recovery of the premises, brought by the heir-at-law of the mortgagee, within twenty years of the latter but not of the former date, (no interest having been paid in the mean time), was too late.—*Doe d. Roy-lance v. Lightfoot*, 8 M. & W. 553.

#### MORTMAIN ACTS.

*Quere*, whether a deed conveying lands by way of mortgage to the trustees of a charity, is within the statute of mortmain (9 Geo. 2, c. 36, s. 1), so as to require enrolment in Chancery: but held, that at all events such a deed has not a "condition for the benefit of a grantor," within the meaning of the 9 Geo. 4, c. 85, s. 1, and therefore if executed before the passing of that act, is valid without enrolment.—*Doe d. Graham v. Hawkins*, 1 G. & D. 551.

#### MUNICIPAL CORPORATION ACTS. See PERSONATION; REFORM ACT.

#### MURDER.

1. Where a wound is wilfully and without justifiable cause inflicted, and ultimately becomes the cause of death, the person who inflicted it is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation.—*Reg. v. Holland*, 2 M. & Rob. 351.
2. (*Indictment—Name of child.*) In an indictment for the murder of a bastard child, the absence of the name is sufficiently accounted for by the child being described as "then lately before born of the body of I. H."—*Reg. v. Hogg*, 2 M. & Rob. 380.
3. (*Sentence for.*) Sentence of death may, since the stat. 6 & 7 Will. 4, c. 30, be recorded against a person convicted of murder.—*Reg. v. Hogg*, 2 M. & Rob. 380.

And see INDICTMENT, 2.

#### NEW TRIAL. See PRACTICE, 1.

#### NOTICE OF ACTION.

In an action by a tenant against his landlord for a malicious charge of felony, under the stat. 7 & 8 Geo. 4, c. 29, s. 45, for stealing fixtures let to him, it is not necessary to give a notice of action, under the stat. 7 & 8 Geo. 4, c. 29, s. 29.—*Dowell v. Benningfield*, 1 Car. & M. 9.

#### ORDER OF REMOVAL.

1. (*Examination—Hearsay.*) The following evidence of a pauper, "I was born illegitimate, at S.," being necessarily hearsay evidence, is insufficient to sustain an order of removal. (8 East, 539.)—*Reg. v. Inhabitants of Rishworth*, 1 G. & D. 597.
2. (*Examination—Hearsay—Grounds of appeal, when too general.*) The examinations upon which an order of removal was made, contained (inter alia) the following statement. "I was overseer of, &c., the appellant parish, during the time J. H., the father of the pauper's husband, occupied the estate, and I collected the poor-rates of him as the occupier." The following (inter alia) were the grounds of appeal, "that J. H. was not rated, and did not pay rates for the estate; that the examination is informal, and wholly insufficient in law, and bad on the face of it; that the examination does not contain any sufficient evidence of a settlement gained in our said parish by J. H.; that the exami-

nation does not state in what years J. H. occupied, &c. or paid rates, &c., or that he resided forty days, &c."

Held, that the above grounds did not entitle the appellant at the trial of the appeal, to object that the rate-book had not been produced before the removing justices, and that the examination contained no legal evidence that J. H. had been rated, because the general objections to the insufficiency of the examinations conveyed no information in itself to the respondents of the ground of appeal intended to be relied on, and was besides preceded by a denial of the fact of rating only, and followed by other specific objections which were equally remote from the point of evidence.—*Reg. v. Inhabitants of Stapleford Fitzpaine*, 1 G. & D. 605.

**3. (*Supersedeas of—Appeal—Mandamus.*)** 1. Where parish officers obtained an order of removal on an insufficient examination, they may procure a supersedeas of the order, although it has been executed by the actual removal of the pauper, and notice of appeal been given.

2. After such supersedeas has been served and all costs have been paid, and the pauper taken back, the parish on which the order was made has no right of appeal.

3. Where an appeal had been entered against an order, after it had been so superseded, and the sessions decided that they had jurisdiction to entertain the appeal notwithstanding, but afterwards ordered it to be struck out, on the ground that the original order of removal had not been filed with the notice of appeal, as required by a rule of their practice relative to the entry of appeals, a rule for a mandamus to them to hear the appeal was discharged, because the result at which they had ultimately arrived was right, and this Court would not inquire into their reasons.—*Reg. v. Justices of the West Riding*, 1 G. & D. 630.

**ORDNANCE, BOARD OF.** See **EJECTMENT**, 1.

#### **OVERSEERS.**

(*Appeal against accounts—Order thereon.*) An order of quarter sessions, on appeal against an account of overseers, is bad, if it does not appear, either by express averment or necessary intendment, to relate to the annual account, for otherwise it may relate to the quarterly account, which the overseers are directed to render by 4 & 5 Will. 4, c. 76, s. 47, and in respect of which there is no appeal to the quarter sessions.—*Reg. v. Spackman*, 1 G. & D. 619.

**OYER.** See **COVENANT**, 2.

**PARTICULARS OF DEMAND.** See **INFERIOR COURT**.

#### **PARTICULARS OF SET-OFF.**

In his particulars of set-off, the defendant claimed "Cash, being the amount of the plaintiff's dishonoured acceptance and charges, 21l. 6s." dated August, 1840. On the trial, he gave evidence of a bill of exchange for 19l., on which an action had been commenced, dated June 23, 1840, payable two months after date, indorsed to him by the plaintiff: Held, that there was no variance whereby the plaintiff could have been misled.—*Parsons v. Wilson*, 1 D. P. C. (N. S.) 181.

**PARTNERSHIP.** See **MINING COMPANY**.

## PATENT.

(*Title of—Specification, construction of—Effect of untrue statement in specification—Notice of objections under 5 & 6 Will. 4, c. 83, s. 5.*) The construction of the specification of a patent belongs to the Court, and not to the jury.

If a specification contain an untrue statement in a material circumstance, of such a nature, that if literally acted upon by a competent workman it would mislead him and cause the experiment to fail, the specification is therefore bad and the patent invalidated, although the jury, on the trial of an action for the infringement of the patent, find that a competent workman acquainted with the subject would not be misled by the error, but would correct it in practice.

In the specification of a patent, the title of which was "An invention for the improved application of air to produce heat in fires, forges, and furnaces where bellows or other blowing apparatus are required," the mode of operation was described as follows:—"A blast or current of air must be produced by bellows or other blowing apparatus, and is to be passed from the bellows, &c., into an air-vessel or receptacle, made sufficiently strong to endure the blast, and from that vessel or receptacle, by means of a tube, pipe, or aperture, into the fire, &c. The vessel or receptacle must be air-tight or nearly so, except the apertures for the admission and emission of air, and at the commencement and during the continuance of the blast must be kept artificially heated to a considerable temperature." After giving directions as to the materials and dimensions of the vessel, the specification proceeded to state, "The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation." In other parts of the specification, the same language was used with reference to the ultimate beneficial effect upon the furnace, &c.: Held, that such was the reasonable construction of the above clause also, and not that the form or shape of the vessel was immaterial to the effect of heating the air within it.

Held also, that the title of the patent was not inconsistent with the specification, but that the invention of applying to fires, &c. air heated in the manner therein stated, might be described as an "improved application of air."

Held also, that in this specification the plaintiff did not claim a patent for a mere principle, but for a mode of applying a well-known principle, viz. the heating of air, by means of a mechanical apparatus to fires and furnaces.

If the notice of objections, delivered by a defendant with his pleas in an action for the infringement of a patent, pursuant to the stat. 5 & 6 Will. 4, c. 83, s. 5, be not sufficiently specific, the plaintiff's course is to apply to a judge at chambers for an order for the delivery of a more specific notice; but if he omit to do so, he cannot object to the generality of the notice at the trial: the only question then is, whether the notice is sufficiently large to include the objections relied on by the defendant.—*Neilson v. Harford*, 8 M. & W. 806.

## PERSONATION.

(*Of voter.*) On the trial of an indictment for personating a burgess at an election of a councillor for a ward of a borough divided into wards under the Municipal Corporations Act, it is enough for the prosecutor to show that the personation took place at what purported to be a ward-election for that ward. It is not necessary to prove the due division of the borough into wards, or that such division was approved of by the Privy Council.—*Reg. v. Thompson*, 2 M. & Rob. 355.

**PEW.**

The churchwardens have a discretionary power to appropriate the pews amongst the parishioners, and may remove persons intruding on seats already appropriated.—*Reynolds v. Monkton*, 2 M. & Rob. 384.

**PLEADING.**

1. (*Evidence under plea denying property, in detinue.*) Under a plea in detinue, denying the plaintiff's property, a lien may be given in evidence.—*Lane v. Tewson*, 1 G. & D. 584; 12 Ad. & E. 116, n.
2. (*Allegation of arbitrator's certificate—Variance.*) Declaration in assumpsit stated, that an action had been commenced by the plaintiff against T. C. for the recovery of 210*l.* 12*s.* 7*d.*, alleged to be due from T. C. to the plaintiff on an account delivered to him by the plaintiff: and thereupon, in consideration that the plaintiff had consented to stay all proceedings in the said action, on security being given to him for the payment of such sum as might be found due from T. C. to the plaintiff on the said account, the plaintiff and T. C. having agreed that such account should be submitted to arbitration, the defendants agreed to pay the plaintiff such part of the said sum of 210*l.* 12*s.* 7*d.* as upon such arbitration should be found due from T. C. to the plaintiff. The declaration then alleged, that the action was submitted to the arbitration of two persons named, who accordingly certified that there was due from T. C. to the plaintiff the sum of 120*l.*; and that the costs amounted to a further sum of 9*l.*, but that neither T. C. nor the defendants paid the same or any part thereof.

The plea set out the certificate of the arbitrators in these terms:—"In pursuance of the within order, we make and publish our certificate, that there is now due from T. C. to the plaintiff, W. K., the sum of 120*l.*, which we order to be paid by the securities [the defendants] on the dates hereunder specified;" with a special traverse that the arbitrators made their certificate of and concerning the said matter in reference so submitted to them as aforesaid, modo et formâ.

Held, that the allegation in the declaration, that the subject-matter of the reference was the particular action against T. C., was not sustained by the production of the certificate, without evidence to show that the arbitrators really adjudicated on the cause only; and that this objection was available under the traverse in the plea.—*King v. Bowen*, 8 M. & W. 625; 1 D. P. C. (N. S.) 21.

3. (*Plea, when amounting to the general issue.*) Assumpsit. The declaration stated, that in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised that she was sound, and averred as a breach that she was not sound. The defendant pleaded that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which were that "a warranty of soundness should remain in force until noon of the day after the sale, when it would be complete, and the responsibility of the seller terminate, unless in the mean time a notice and certificate of unsoundness were given:" that the sale took place subject to the rules, and that the same were agreed to by the parties, and that such notice and certificate were not given within the time limited:—Held, that the plea was good, and that it did not amount to the general issue. (2 B. & C. 20.)—*Smart v. Hyde*, 8 M. & W. 723; 1 D. P. C. (N. S.) 66.
4. (*Profert.*) Where the defendant, a surety, by deed poll guaranteed to the plain-

till the payment of a sum of money : Held, in an action on the guarantee, that the defendant might plead an indenture of release from the plaintiff to his principal without making perfect of the indenture. (1 P. & D. 287.)—*Bain v. Cooper*, 8 M. & W. 751 ; 1 D. P. C. (N. S.) 11.

5. (*Implied promise from relation of landlord and tenant—Assumpsit—Consideration.*)

A declaration in assumpsit stated, in substance, that the defendant agreed to let, and the plaintiff to take, a certain messuage and premises on certain specified terms, and that afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, and that he then had power to let the messuage and premises to the plaintiff without restriction as to the purpose for which the same should be used and occupied : Held, on special demurrer, that such a promise could not be implied from the relation of the parties, and that the consideration alleged was insufficient to sustain it.—*Jackson v. Cobbin*, 8 M. & W. 790 ; 1 D. P. C. (N. S.) 96.

6. (*Several Pleas.*) In trespass for entering a steam-vessel, the Court allowed the defendant to plead, first, not guilty ; second, leave and licence ; third, that the defendant entered the vessel to prevent a breach of the peace ; fourth, that the vessel was in danger of being wrecked, and the defendant went on board to save it ; fifth, that a third party had a lien on the vessel, and that the defendant, as his servant, went on board to take possession of her.

The rule of T. T. 1 Will. 4, s. 13, does not prevent a defendant from applying to the Court, when leave to plead several matters has been refused by a judge ; nor need the previous application be noticed in the rule.—*Johnstone v. Knowles*, 1 D. P. C. (N. S.) 30.

7. (*Replication de injuriâ.*) To an action by drawer against acceptor of a bill of exchange, the defendant pleaded that he accepted the bill in blank, and consented that the plaintiff should draw thereon a bill at two months, but that the plaintiff made the bill payable at one month. Held, that de injuriâ was not a good replication.—*Fisher v. Wood*, 1 D. P. C. (N. S.) 54.

8. (*Trespass—Abutments.*) A description of a close by two abutments only, is a sufficient compliance with the rule of H. T. 4 Will 4.—*North v. Inghemells*, 1 D. P. C. (N. S.) 151.

9. (*Entering verdict on several issues.—Nolle prosequi.*) To a declaration in assumpsit, containing counts for goods sold, money lent, money paid, and on an account stated, the defendant pleaded non assumpsit, the Statute of Limitations, payment, and a set-off upon a judgment recovered in the Queen's Bench for 58*l.* 13*s.* and of 200*l.* for goods sold, &c. The plaintiff replied, as to so much of the fourth plea as related to the said judgment, that inasmuch as he could not deny that he was indebted to the defendant in the said sum of 58*l.* 13*s.* on the said judgment, he admitted the same, and therefore he would not further prosecute his suit against the defendant in respect of so much of the said promises in the declaration mentioned as were satisfied by the said judgment being so set off. Issue being joined on the other pleas, and on the general set-off alleged in the fourth plea, the plaintiff at the trial proved a claim for 200*l.* 16*s.* 11*d.*, a portion of his whole demand being barred by the Statute of Limitations : the defendant proved no payment or set-off beyond the amount of

the judgment mentioned in the plea : Held, that the defendant was entitled to the verdict on the first and second issues, and that the plaintiff was entitled to a verdict on the third and fourth issues.—*Amor v. Cuthbert*, 1 D. P. C. (N. S.) 160.

And see **BILLS AND NOTES**, 4, 5; **BOND**; **COVENANT**, 2; **DEBTOR AND CREDITOR**, 1; **JOINT STOCK BANKING COMPANY**; **PRINCIPAL AND AGENT**, 2; **SEPARATION DEED**.

#### POOR RATE.

(*Appeal.—Overseers' accounts.*) Although parish officers cannot abandon a poor rate, after it has been allowed and published, so as to render it no longer a subsisting rate, yet they may so far abandon it as to refuse to incur expense in supporting it on appeal; and they have no right, as a matter of law, independently of the discretion of the justices, to have the expense of contesting such an appeal allowed them in their accounts.—*Reg. v. Finch*, 1 G. & D. 585.

#### POUND BREACH.

Where a bailiff in possession of goods under a landlord's distress receives a fi. fa. from the sheriff, and sells the goods under it, the sheriff is liable in an action for pound-breach and rescue at the suit of the landlord.—*Reddell v. Stowey*, 2 M. & Rob. 358.

#### PRACTICE.

1. (*New trial, time for.*) The Court will not permit a motion for a new trial to be made after the proper time, upon a mere suggestion that the delay was occasioned by the attorney mistakenly supposing that affidavits which it was impossible to obtain in time would be necessary.—*Price v. Duggan*, 3 Scott, N. R. 47.
2. (*Judgment of non pros.—Time for declaring.*) Whether an appearance be entered in term time or vacation, the plaintiff has the whole of the term next following to declare in; and therefore, where an appearance was entered in Easter Term, and judgment of non pros. signed in Trinity term, it was held that the judgment was irregular.—*Foster v. Pryme*, 8 M. & W. 664.
3. (*Short notice of trial.*) Where a defendant obtained an order for time to plead, on the terms of taking short notice of trial for the sittings in and after Easter Term : Held, that he was not thereby obliged to take short notice of trial for the sittings in or after any subsequent term, but the plaintiff must, in such case, give an ordinary notice.—*Slatter v. Painter*, 8 M. & W. 672; 1 D. P. C. (N. S.) 35.
4. (*Judgment as in case of nonsuit.*) Where one of several defendants moves for judgment as in case of a nonsuit, the rule is to show cause why the judgment should not be entered generally for the defendants.—*Sawyer v. Hodges*, 1 D. P. C. (N. S.) 16.
5. (*Rule to compute.*) No affidavit is necessary in support of a motion for a rule to compute, in C. P.—*Bridport v. Jones*, 1 D. P. C. (N. S.) 190.
6. (*Right to begin.*) Declaration on a policy of insurance alleged that the same was effected in pursuance of a declaration by the plaintiff, averring amongst other things, that the party whose life was insured was not accustomed to any habits prejudicial to health, and was in a sound state of health, and the policy was to be void in case of misrepresentation. Pleas, 1st. that the party was

assaulted a woman suspected to be guilty, to wit, of incestuous: Sed. that the jury was a bad and dishonest set of men. Replication—De injuria. Issue. That the defendant was innocent of rape. —*Pear v. Rogers*, 2 M. & Rob. 215

7. Issue. Is an issue from the Court of Chancery to try whether A. B. was at a certain time in a certain place, the plaintiff alleging the statement is correct to begin.

In such cases it will be presumed that the party alleged to be plaintiff was correct to begin. —*Pear v. Rogers*, 2 M. & Rob. 215.

8. Issue. In trespass on the freehold the defendant pleaded not guilty, and a plea of *non est*. The plaintiff replied in the *interplectus* plea of *injuria*, and newly assigned that the trespasses were committed on other and different occasions than that in the plea mentioned. To the new assignment the defendant pleaded payment of money into Court, relinquishing "so much of the plaintiff's plea as is therein contained, as shall be deemed or construed to traverse or deny the said trespasses newly assigned, in any part thereof. To this plea the plaintiff replied, accepting the sum paid into Court "in full satisfaction and acquittance of the said several trespasses above newly assigned:" Held, that on these pleadings the plaintiff had the right to begin. —*Prior v. Leonard*, 1 Carr. & M. 21.

9. Issue. Assured in a policy of insurance on life. Plea, that at the time of the designation of benefit and of the policy, the habits of the party whose life was insured were moderate and temperate, and that he was addicted to excessive drinking. The repudiation stated that his habits were moderate and temperate, and not moderate and intemperate, and that he was not addicted to excessive drinking. Held, that the plaintiff ought to begin. —*Craig v. Fife*, 1 Carr. & M. 43.

10. (Trial of several issues.) In *trespass quare clausum fregit*, where there were several issues, and among them one on the plaintiff's possession of the close, the plaintiff has a right to a trial of all the other issues, though it appears on the opening of the evidence that he was not in possession of the close. —*Fry v. Mowbray*, 2 M. & Rob. 303.

11. (On trial of issue out of Chancery.) On the trial of an issue directed by the Court of Chancery to try whether the plaintiff was the next of kin of J. S., (with the usual order for indorsing any special matter on the record), one defendant A. B. claimed to be as nearly related to J. S. as the plaintiff was; the other defendant, C. D., set up a claim inconsistent with the cases both of the plaintiff and A. B.: Held, that at the close of the plaintiff's case C. D. should not only open but prove his case, and that then A. B. should do the like, the plaintiff having the general reply on both. —*Phillips v. Willett*, 2 M. & Rob. 319.

## PRACTICE IN CRIMINAL CASES.

1. (Traverse.) A party arrested during the assizes under an indictment for misdemeanor cannot be discharged without pleading and traversing. —*Reg. v. Wattenhall*, 2 M. & Rob. 291.
2. A defendant indicted for felony may demur, and if his demurrer be overruled, may still plead not guilty; and semble, he may demur and plead over to the felony at the same time. (3 B. & C. 502; 8 East, 107.) —*Reg. v. Phelps*, 1 Car. & M. 180.



3. (*Conviction for assault on indictment for felony.*) A prisoner charged with murder cannot be convicted on that indictment for an assault, under the 1 Vict. c. 80, s. 5, if the assault took place under such circumstances as failed to connect the prisoner with the death.—S. C.

#### PRINCIPAL AND AGENT.

1. (*Liability of committee-men of club.*) In an action against the defendants to recover the price of wine furnished to a subscription club, of the committee of which the defendants were members, it was proved that the wine was ordered by the house-steward, who stated that he had authority to do so from the members of the committee. It was not shown that the defendants had either personally interfered in ordering the wine, or been present at any meeting of the committee when the authority to order the wine was given; but merely that they were members of the general body of the committee: Held, that under these circumstances the question for the jury was not whether the defendants by their course of dealing had held themselves out as personally responsible to the plaintiffs, but whether they had individually authorized the making of the contract in the ordering of the wine.—*Todd v. Emly*, 8 M. & W. 505.

2. (*Liability of agent for freight—Pleading.*) *Indebitatus assumpsit* for freight payable by the defendant to the plaintiffs for and in respect of the conveyance by them for the defendant, and at his request, of divers goods in and on board of a certain ship, from divers places to divers other places.

At the trial it appeared that the plaintiffs had received on board their vessel a quantity of coals from the Burnt Island Company, to be carried to London; that the captain signed a bill of lading, by which the coals were made deliverable "unto N. T. [the defendant] for the London Gas Company, or to his assigns, he or they paying freight for the said goods 10s. per ton in cash on true delivery." On the arrival of the vessel in London, the defendant produced the bill of lading and received the goods under it, and afterwards offered to pay the freight by a bill at two months: Held, that the defendant was not personally liable, inasmuch as on the face of the bill of lading he was a mere agent to receive the goods for the company, the property vesting in them.

*Quere*, whether the declaration was sufficient, it not being in the usual form of a common count for freight, and not stating any delivery?—*Amos v. Temperley*, 8 M. & W. 798.

And see **BILLS AND NOTE**, 3.

#### PRINCIPAL AND SURETY.

- (*Contribution.*) Where one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, on the note becoming due, paid the amount, although no demand had been made or action brought against him by the holder: Held, that such payment could not be considered voluntary, and that he might sue his co-surety for contribution.—*Pitt v. Purssord*, 8 M. & W. 538.

#### PRISONER.

- (*Charging in execution.*) In the Common Pleas a prisoner need not be charged in execution by motion: but it being sought to procure the discharge of a prisoner who is brought up by habeas corpus ad satisfaciendum to be charged in execution, the proper course is that he be charged in execution, and the Court will then grant a rule nisi for his discharge.—*In re Stanford*, 1 D. P. C. (N. S.) 163.

## PROCESS.

1. (*Amendment of writ of summons.*) The Court will amend a writ of summons, although more than four months have elapsed since it was issued, by altering the cause of action from debt to assumpsit, on an affidavit that if a fresh action were commenced, the Statute of Limitations would be a bar; but the Court cannot amend the copy of the writ served, as they have no power over it.—*Eccles v. Cole*, 8 M. & W. 537; 1 D. P. C. (N. S.) 34.
2. (*Distringas, affidavit for.*) It is essential that the affidavit in support of a motion for a distringas to compel appearance should state the locality of the defendant's residence.—*Prime v. Giles*, 1 D. P. C. (N. S.) 167.

## PROCHEIN AMY.

Where an uncertificated bankrupt was procured to be appointed prochein amy for an infant plaintiff, the Court, on motion, removed him, and ordered another to be appointed.

The father, as being the natural guardian of the infant, ought in the first instance to be appointed prochein amy, and if his evidence is likely to be required at the trial, an application ought to be made to the Court to release him, by the appointment of a proper substitute.—*Watson v. Fraser*, 8 M. & W. 660.

## RAILWAY.

- (*Indictment for obstructing.*) A party is liable to be indicted under stat. 3 & 4 Vict. c. 97, s. 15, if he designedly places on a railway substances having a tendency to produce an obstruction of the carriages, though he may not have done the act expressly with that object.—*Reg. v. Holroyd*, 2 M. & Rob. 339.

## RAILWAY ACT.

1. (*Compensation clause, construction of.*) By section 9 of the Eastern Counties' Railway Act (6 & 7 Will. 4, cap. cvi.), the company are empowered to raise or lower roads, in order more conveniently to carry the same over or under or by the side of the railway, making satisfaction, "in manner hereinafter mentioned, to all persons, &c., interested in any lands which shall be taken, used, or injured, for all damages."

By section 28, the owners of lands through which the railway is to be made, may agree to accept satisfaction for the value of such lands, and also compensation for any damage by them sustained by the severing or dividing of such lands, or for any damage sustained by the taking thereof, or by reason of any of the works authorized; and if such parties and the company shall not agree as to the amount of such purchase-money, satisfaction, or compensation, the same is to be ascertained by a jury as "hereinafter is directed."

By section 29, "for settling all differences which may arise between the said company and persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of the act," it is enacted, "that, if any of the parties entitled to receive such purchase-money, satisfaction, recompence, or other compensation as aforesaid, shall refuse to accept such purchase-money, satisfaction, &c., as shall be offered by the company," a jury is to be summoned in the manner provided, "and such jury shall inquire of and give a verdict for the sum to be paid for the purchase of such land, and also the sum to be paid by way of satisfaction, recompence, &c., either for damage which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands, whereof any such

person as aforesaid shall be seised," &c., "which satisfaction, recompence, &c., for such damage or loss shall be inquired into and assessed separately from the value of the land so to be taken or used as aforesaid."

Held, although the directions by section 29, as to the finding by the jury, applied in terms to compensation for such land only as should be "taken," and to the ulterior damage consequent upon such taking, yet that the clause extended also to a case where the land of a party had not been "taken," but had been "injuriously affected" by the lowering of a road in front of such land, the access to which was thereby impeded.—*Rex v. Eastern Counties' Railway Company*, 1 G. & D. 589.

- 2 (*Construction of—Evidence of proprietorship of shares—Register of proprietors.*) By the 145th section of the London Grand Junction Railway Act, 6 & 7 Will. 4, c. 104; the company are required to cause "the names of the several corporations, and the names and additions of the several persons who shall then be or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to kept by the said company, and after such entry made, to cause their common seal to be affixed thereto." By s. 147 it is enacted that the company shall, in some proper book to be provided by them for that purpose, "enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to share therein."

And by section 152 it was enacted, that, in any action to be brought by the company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, "in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the said company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein:" Held, that the book thus referred to and made *primâ facie* evidence of proprietorship by the 152nd section, was the book which the company were required by the 145th section to keep; and that a book kept by them containing the names and additions of all the persons whom the company supposed to be the persons entitled to shares, together with the number of those shares (though not in all cases the amount of subscription paid thereon), and the proper number by which each share was distinguished, and sealed from time to time with the common seal of the company, was a book substantially kept in compliance with the act, and admissible in evidence, though it contained the names of persons not entitled, and omitted those of others who were entitled to shares, and though there were some entries therein to which there was no seal properly applicable.

Held, also, that the *primâ facie* evidence of proprietorship in the defendant established by the production of this book, was not rebutted by proof that a third person was the original subscriber to the parliamentary contract in respect of

the shares in question, and that the shares had not been conveyed to the defendant by deed, as required by the act.—*London Grand Junction Railway Company v. Freeman* (in error), 2 Scott, N. R. 705.

3. (*Construction of—Calls, how made—Transfer—Stamp—Proof of proprietorship—Interest, how recoverable—Minutes, how signed—Register-book, how kept.*)

1. By the 187th section of the Brighton Railway Act, 7 Will. 4 & 1 Vict. c. 119, it is enacted, that the orders and proceedings of all meetings of the company and the directors shall be entered in some book or books to be provided or kept for that purpose, and shall be signed "by the chairman of such respective meetings, and such orders and proceedings, when so entered and signed, shall be deemed original orders and proceedings," &c.: Held, that a signature by the chairman, at a subsequent meeting, at which the minutes (of the former meeting) were read over and confirmed, was a sufficient compliance with the act.

2. By section 146, the directors are empowered from time to time to make calls, so that the aggregate amount of calls made or principal money paid for or in respect of any shares shall not amount to more than 50*l.* on any share of that amount, and so that no call shall exceed 10*l.* upon each share, and that the total amount of such calls in any one year shall not exceed 25*l.* each share, and so that an interval of three calendar months at the least shall always elapse between the day appointed for payment of one call and the day appointed of the next succeeding call; and twenty-one days' notice at the least shall be given of every such call by advertisement in certain newspapers, and all monies so called for shall be paid to such persons and in such manner as in such notice shall be appointed, and the respective owners of shares shall pay their rateable proportion of the moneys to be called for as aforesaid to such persons and at such times and places as shall be appointed as aforesaid. And by the 148th section it is provided, that, on the trial for any action for calls, it shall only be necessary to prove that the defendant was a proprietor, "and that such notice was given as is directed by the act of such calls having been made, with proving the appointment of the directors, or any other matter whatsoever:" Held, that it was not necessary that the resolution of the directors for making a call should embody within it the time and place of payment; but that it was sufficient that these particulars were notified to the shareholders in the advertisement published according to the directions of the above section—all that is laid down in that clause as matter of condition to the legality of any call being the amount of each separate call, and the aggregate amount of such calls in any one year, and the interval to be observed between successive calls: Held, also, that it must be presumed that the secretary had authority to insert the advertisement, or that the directors adopted the act, the contrary not being shewn.

3. By section 140, the company are required, "at their first or some subsequent general meeting, and afterwards from time to time to cause the names of the several corporations and the names and additions of the several persons, who shall then be or who shall from time to time thereafter become entitled to shares in the undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book kept by the company, and after such entry made, to cause their common seal to be affixed thereto.

By section 142 the company are further required, in some book to be provided for that purpose, to enter and keep "a true account of the names of the several corporations, and of the names and places of abode of the several persons," who

shall from time to time be entitled to shares in the undertaking. And by section 148, it is enacted, that "in order to prove that the defendant (in an action for calls) was a proprietor of such share or shares in the said undertaking as alleged, the production of the books in which the company is by this act directed to enter and keep respectively the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to, and an account of the several names of the several corporations, and the names and places of abode of the several persons who shall from time to time be entitled to shares in the undertaking, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Held, that the book required by section 140 was rendered inadmissible by the absence of the addresses of the majority of the shareholders,

4. Held, also, that the production of the book mentioned in s. 142, as well as that mentioned in s. 140, was necessary to constitute the *prima facie* proof of proprietorship referred to in s. 148.

5. By s. 155, shares are made transferable by deed, a form of which is given; and it is enacted that, "on every such sale, the deed or conveyance (being executed by the seller and purchaser), shall be kept by the company, or by the secretary or the clerk of the company; who shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer; and until such memorial shall have been made and entered as before directed, the seller of such share shall remain liable for all future calls, and the purchaser shall have no part or share of the profits of the undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking:" Held, that to entitle the company to maintain an action for calls against one to whom shares had been conveyed under the provisions of this section (such transfer being the only evidence to show the defendant a proprietor), it was not essential to prove that the deed of transfer had been duly memorialized.

6. In order to prove that the defendant was a proprietor, the plaintiffs produced a deed of transfer executed pursuant to s. 155, by one F. as the transferrer and by the defendant as the transferee. This document appeared to have been originally intended as a conveyance of the shares therein mentioned by F. to one H., to whose brokers (E. and B.) it was handed after its execution by F., and after the consideration had been paid by E. and B. to F.'s broker, but before the conveyance was executed by H., H.'s name was at the desire of E. and B. obliterated by drawing a pen through it, and the transfer was then re-executed by F. and executed by the defendant F. merely passing a pen over his previous signature: Held, that in the absence of evidence to show that the insertion of the name of H. was a mere mistake, such alteration of the deed without re-stamping, rendered it void.

7. It is no answer to an action for calls, that the directors have declared the shares forfeited, and have given the defendant notice of such declaration, unless it appears that the declaration of forfeiture has been confirmed at a general meeting, pursuant to s. 146.

8. The company are entitled to recover as damages interest upon arrears due for calls. (1 Man. & Gr. 448; 7 M. & W. 243; 4 B. & Ald. 672; 1 Dougl. 56.)—*London and Brighton Railway Company v. Fairclough*, 3 Scott, N. R. 68.

**RAPE.** See **INDICTMENT**, 4.

**RECEIVING STOLEN GOODS.**

(*Joint receiving.*) Where A. knowing that goods have been stolen, directs B., his servant, to receive them into his premises, and B. in pursuance of that direction afterwards receives them in A.'s absence, B. knowing that they have been stolen, they may be jointly indicted for receiving them.—*Reg. v. Parr*, 2 M. & Rob. 346.

**REFORM ACT.**

(*Remedy of town-clerk for services performed under.*) The town-clerk of a borough cannot maintain an action of debt against the corporation for fees in respect of the performance of the duties imposed upon him by the Reform Act or the Municipal Corporation Act; although he received no stated salary as town-clerk, and although the then corporation, in several years before the passing of the Municipal Corporation Act, made payments to him for the performance of the duties imposed on him by the Reform Act.—*Jones v. Mayor of Carmurthen*, 8 M. & W. 605.

**RETURNING FROM TRANSPORTATION.**

(*Reward under 5 Geo. 4, c. 84, s. 22.*) The judge before whom a prisoner is tried for returning from transportation has power to order the county treasurer to pay the prosecutor the reward under 5 G. 4, c. 84, s. 22.—*Reg. v. Emmons*, 2 M. & Rob. 279.

**SEDUCTION.** See **BANKRUPTCY**, 2.

**SEPARATION DEED.**

(*Construction of—Covenant of indemnity against wife's debts—Pleading.*) A deed of separation between husband and wife contained a covenant by the wife and her trustees, that she, her executors or administrators, or the trustees, or some or one of them, should and would at all times save, defend, and keep harmless and indemnified the husband from and against the debt or debts, sum or sums of money, which she the wife had then, at the time of the making of the indenture, contracted, or which she should at any time thereafter, during the separation, contract: Held, that this covenant included debts previously contracted by the wife for necessaries, while living with the husband.

To an action on this covenant, assigning a breach in not indemnifying against a debt of the wife, the defendants pleaded, that the alleged debt in the declaration mentioned was not contracted within the true intent and meaning of the covenant; concluding to the country: Held bad, as being a traverse of matter of law.—*Summers v. Ball*, 8 M. & W. 596.

**SEPULTURE.** See **MANDAMUS**.

**SETTLEMENT.**

1. (*By possession of estate—Operation of 4 & 5 Will. 4, c. 76, s. 68.*) The Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, s. 68, extinguishes a settlement "by possession of an estate or interest," on the pauper ceasing to reside within ten miles thereof, and does not merely suspend it. A settlement claimed under the statute 13 & 14 Car. 2, c. 12, s. 1, by "coming to settle" on a tenement of the yearly value of 10*l.* in right of the pauper's own estate in it, is a settlement by possession of an estate within the meaning of that act.—*Reg. v. Inhabitants of St. Giles in the Fields*, 1 G. & D. 557.
2. (*Operation of 4 & 5 Will. 4, c. 76, s. 68—Lunatic.*) A person inherited a real estate and thereby acquired a settlement, lived with his mother in a house, part of the estate. He became insane and was removed by his relations to the county

asylum, which was more than ten miles from the parish in which the estate was. He was maintained in it during four years, partly by his relations and partly from the rents of his estate: Held, that on being removed to the asylum, he, though a lunatic at the time of his removal, had "ceased to inhabit" within the meaning of the statute 4 & 5 W. 4, c. 76, s. 68, and had therefore lost his settlement by estate. *Reg. v. Inhabitants of Whissendine*, 1 G. & D. 560.

3. (*By estate in right of wife.*) Testator devised his real estate to trustees, to sell and divide the proceeds among his nine children, the share of such of his daughters as should be married at his decease to be to their separate use.

The pauper before testator's death married one of the daughters, and resided with her in a house, part of the above estate, paying rent weekly to the testator. He resided also two years after testator's death, and before the real estate was sold, paying the rent to the trustees: Held, that he gained no settlement.—*Reg. v. Inhabitants of St. Margaret, Leicester*, 1 G. & D. 625.

**SHERIFF.** See POUND-BREACH.

### SHIPPING.

(*Liability of owners for collision of ships.*) The owners of a vessel disabled by the negligence of the crew are answerable for damage done by its accidentally drifting, when so disabled, against another vessel.—*Seccombe v. Wood*, 2 M. & Rob. 290.

And see INSURANCE, 1.

### SIMONY.

(*Evidence of division of parish—Proof of presentation.*) A declaration alleged the division of a parish into several distinct parishes by order of the king in council (under 58 Geo. 3, c. 45): Held, that the allegation could not be proved by production of the Gazette containing a copy of such order.

In debt for penalties under 31 Eliz. c. 6, for a simoniacal contract to present, the declaration alleged a contract by the clerk to buy the advowson, if he were presented to the living, and a presentation in pursuance of such contract: Held, that proof of presentation was essential to the action, and that for that purpose it was not enough to show that the defendant prepared a presentation and tendered it to the bishop's secretary, but never was in fact used or acted upon, the clerk having been afterwards instituted on his own petition as equitable owner of the advowson.—*Greenwood v. Woodham*, 2 M. & Rob. 363.

### SPECIAL JURY.

Issues of *devisavit vel non* were directed by the Master of the Rolls, who ordered that they should be tried by a special jury, but that none of the special jury should reside within twelve miles of Gloucester, the assize town. At the trial, eight special jurors only appeared, whereupon the plaintiff's counsel prayed a *tales*, but the other party objected. The judge refused to grant a *tales*, on the ground that there being no order of the Master of the Rolls as to the *talesmen*, and their residing within twelve miles of Gloucester being no legal ground of challenge, they could not be asked on the *voir dire* as to their residences; and that if any of them did reside within the twelve miles, a new trial would probably be ordered on that ground. The trial therefore stood over until the next assizes.—*Wood v. Thompson*, 1 Carr. & M. 171.

### STAMP.

(*On conveyance—When second stamp necessary.*) In proving title in ejectment a



deed of conveyance duly stamped was produced, which purported to have been executed by power of attorney, but no power of attorney was proved or produced; on the same parchment was a writing bearing a later date, which was a confirmation of the former instrument, and also a substantive conveyance; this instrument was not properly stamped as a conveyance: Held, that an additional conveyance stamp was not necessary.—*Doe d. Priest v. Weston*, 1 G. & D. 582.

And see WITNESS, 3.

#### THREATENING LETTER.

Sending a letter to A. B., threatening to burn a house of which he is owner, but let by him to, and occupied by, a tenant, is not an offence within the 4 Geo. 4, c. 54, s. 3. (*Russ. & R. C. C. R.* 484.)—*Reg. v. Burridge*, 2 M. & Rob. 296.

#### TRESPASS.

(*De bonis asportatis, measure of damages in.*) Where the seller of goods, which have not been paid for according to the contract, retakes them from the buyer without his consent, although under circumstances inducing a suspicion of fraud in the buyer, such retaking would be no answer to an action by the seller for the price. Therefore, in an action of trespass by the buyer against the seller, for so taking the goods, the plaintiff is entitled to recover their full value, and the jury cannot, in estimating the damages, take into consideration the debt due to the defendant, nor treat it as being diminished pro tanto by the value of the goods retaken.—*Gillard v. Brittan*, 8 M. & W. 575.

And see LICENCE; PLEADING, 8.

#### TRESPASS FOR MESNE PROFITS.

A verdict may be found against a defendant in trespass for mesne profits, although he never actually occupied during the time of the trespass, it being proved that, before the trespass (he being then lawfully in possession) he underlet to a third person, and that after his interest determined, and vested in the plaintiff, that person held on, and the defendant continued to receive rent of him, and declared him to be his tenant when the plaintiff demanded possession, alleging title in the party under whom the defendant formerly held. (4 Taunt. 720.)—*Doe v. Harlow*, 12 Ad. & Ell. 40.

TOWN CLERK. See REFORM ACT.

#### TROVER.

(*What is a conversion.*) Trover for two horses. It appeared at the trial that the defendant was the manager of a ferry from B. to L., and that the plaintiff embarked on board the defendant's ferry-boat at B., having with him the horses in question, for the carriage of which he had paid the usual fare. When the defendant came on board, it having been suggested that the plaintiff had behaved improperly on board, he the defendant told the plaintiff he would not carry the horses over the water, and that he must take them on shore. The plaintiff refused to do this, and the defendant took them from the plaintiff and put them on shore, and they were conveyed to an hotel kept by the defendant's brother. The plaintiff remained on board and was conveyed over the water. On the following day the plaintiff sent for the horses, but they were not delivered up; a message was however afterwards sent to the plaintiff, that he might have the horses on sending for them and paying for their keep, but that if he did not send for them, they would be sold to pay the expenses. The latter was accordingly done, and this action was brought. The defence set up was, that the plaintiff having mis-

conducted himself on board, the horses were put on shore in order to get rid of the plaintiff by inducing him to follow them.

The learned judge, in summing up, told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct justified his removal from the steam-boat, and he had refused to go without his horses: Held, that this amounted to a misdirection, as a mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel.—*Fouldes v. Willoughby*, 8 M. & W. 540; 1 D. P. C. (N. S.) 86.

#### UNIVERSITY.

(*Jurisdiction of superior courts over resident members of the Universities.*) Where the Chancellor's Court of the University of Oxford had proceeded against a party for contumacy, in suing a resident under-graduate in one of the superior courts of Westminster, and had issued a warrant to arrest him for not paying the costs of the proceeding, this Court made a rule absolute for a prohibition without requiring the applicant to declare in prohibition.—*Reg. v. University of Oxford*, 1 G. & D. 537.

#### USE AND OCCUPATION.

1. In assumpsit for use and occupation, it appeared that the defendant held the premises under a written agreement, but there was no evidence of occupation except that the defendant sent a person to clean the house, and paid for the paper with which one of the rooms was decorated. The jury having found for the plaintiff, the Court declined to interfere.—*Smith v. Twoart*, 3 Scott, N. R. 172.
2. (*Liability of tenants holding over.*) The defendant took certain premises of the plaintiff for nine months, at a rent certain, with the option, at the end of that time, of taking a lease for seven, fourteen, or twenty-one years. Before the expiration of the nine months, the defendant let the premises to a company for six months, who actually occupied them for that period: Held, that at the end of a year from the expiration of the nine months, the defendants were liable to the plaintiff, in an action for use and occupation, for a year's rent. (7 M. & W. 127.)—*Waring v. King*, 8 M. & W. 571.

#### VENUE.

(*Changing venue in action on written contract.*) The venue may be changed in an action on a written contract which is to be performed in a particular place, and for the breach of which the cause of action arises wholly in one county; and *semble*, that it may be so changed in all actions on contracts, though in writing, except on specialties, bills, and notes.—*Mondel v. Steele*, 8 M. & W. 640; 1 D. P. C. (N. S.) 1.

#### WARRANT OF ATTORNEY.

On a motion to enter up judgment on an old warrant of attorney, the absence of the affidavit of the attesting witness was held to be sufficiently supplied by an affidavit stating unsuccessful endeavours to find him, and also stating an admission by the defendant of his own liability, and an acknowledgment by him of the handwriting of the attesting witness.—*Reid v. Ford*, 1 D. P. C. (N. S.) 187.

WARRANTY. See PLEADING, 3.

## WITNESS.

1. (*Commission under 1 Will. 4, c. 22.*) Upon an application for a commission to examine witnesses abroad, the Court will so mould the rule as to meet the peculiar circumstances of the case.—*Mills v. Wallbank*, 3 Scott, N. R. 177.
2. (*Cross-examination.*) A witness called under a mistake of counsel as to his being able to speak to a transaction is not liable to cross-examination, though sworn, if the mistake be discovered before any question is put. (1 Phill. Ev. 909.)—*Wood v. Mackinson*, 2 M. & Rob. 273.
3. (*Competency—Release—Stamp.*) A release executed by several commoners of their separate rights of common over the same waste, is sufficient to make them all competent witnesses in an action touching the extent of the waste, though there be only one stamp.—*Carpenter v. Buller*, 2 M. & Rob. 298.
4. (*Examination of adverse witness.*) The counsel who calls a witness who gives adverse testimony on re-examination, cannot ask whether the witness had not given a different account to the attorney. (1 M. & Rob. 414; 2 M. & Rob. 153.)—*Winter v. Butt*, 2 M. & Rob. 357.
5. (*Subpœna duces tecum—Right of witness objecting to production of document.*) A witness called on his subpœna duces tecum, who objects to the production of documents, has no right to have the question of his liability to produce argued by his counsel retained for that purpose.—*Doe d. Rowcliffe v. Earl of Egremont*, 2 M. & Rob. 386.
6. (*Competency of bankrupt.*) In an action against the assignees of a bankrupt for seizing goods alleged to have been assigned to the plaintiff by the bankrupt before his bankruptcy, the bankrupt is a competent witness for the plaintiff, to prove that the assignment was made for a valuable consideration, and in consequence of pressure, although the defendants rely on the assignment as constituting in itself an act of bankruptcy.  
In such action, where no notice has been given of disputing the trading, act of bankruptcy, or petitioning creditor's debt, the petitioning creditor (having assigned his debt and executed a release to the assignees) is a competent witness for them to prove an act of bankruptcy prior to that on which the adjudication took place, for the purpose of overreaching the alleged assignment to the plaintiff.—*Smith v. Groom*, 2 M. & Rob. 388.
7. (*Competency of petitioning creditor.*) In an action by a bankrupt against his assignees to try the validity of the fiat, the petitioning creditor is not a competent witness for the defendant, to prove the petitioning creditor's debt; and the fact of his having assigned his debt will make no difference.—*Carruthers v. Graham*, 1 Carr. & M. 5; 2 M. & Rob. 368.

## WRIT OF ERROR.

1. (*Time for reversal of.*) In error coram vobis, the plaintiff cannot move for a reversal of judgment on production of the postea, until four days after trial. (1 Stra. 127.)—*Sexton v. Astrop*, 1 D. P. C. (N. S.) 14.
  2. Where a defendant in execution sued out a writ of error coram vobis five months after judgment signed, the Court ordered his discharge out of custody unless the plaintiff carried in the judgment roll.—*Astrop v. Sexton*, 1 D. P. C. (N. S.) 33.
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## EQUITY.

[Containing Cases in 1 Craig & Phillips, Part 2 ; 10 Simons, Part 4 ; 1 Young & Collier, New Cases, Part 1 ; and 1 Hare, Part 1.]

### ACCOUNT.

(*Agent—Sales on credit.*) In a suit for an account against an agent, an admission by him in his answer that he had sold property of the principal on credit, which he insisted was according to the usual way of business, was held no sufficient ground for an inquiry as to wilful default.—*Pelham v. Hilder*, Y. & C. 3.

### ADMINISTRATION.

1. (*Administration ad litem.*) A bill having been filed for an account by a residuary legatee against A. and B., administrators with the will annexed, A. died without having appeared to the bill, and C., having obtained letters of administration limited to attend, substantiate, and confirm the proceedings in the suit, was made a party by supplemental bill : Held, that a decree for an account of testator's assets received by A. could not be made against such limited administrators, and that the plaintiffs were not at liberty to waive that account without the assent of the other defendant.—*Clough v. Dixon*, S. 564.
2. (*Administration by agent.*) Pending a contest in a Spanish Court between two wills of a deceased Spaniard, the plaintiff, who was resident in Spain, was appointed by the Court there judicial administrator of the deceased's goods, and he afterwards, with the sanction of that Court, appointed the defendant his attorney to recover 10,000*l.* due to deceased's estate in this country. Defendant, under that power, procured from the Prerogative Court an administration limited to receive 10,000*l.* until the plaintiff should obtain administration to the deceased, and he afterwards procured payment of the 10,000*l.* : Held, that he might safely pay that sum over to the plaintiff, having recovered it as his agent, and that he was bound to do so.—*De Viesca v. Lubbock*, S. 629.

### ADMINISTRATION OF ASSETS.

1. (*Admission—Acknowledgment.*) *Quære*, whether an acknowledgment in writing by executors, that they owed the plaintiff 200*l.* for a legacy, and the interest thereon, is an admission of assets : it was held, that unless it did, it created no personal demand enforceable in equity against the executors, and that whether it did or no, it gave no right of action against them at law.—*Holland v. Clark*, Y. & C. 151.
2. (*Old estate—Legal title.*) A party having procured *administration de bonis non* to a testator who had died 150 years ago, but having only made out a beneficial title to one-fourth of a fund belonging to the estate, which had never been got in ; the Court ordered payment to him of that one-fourth only, and ordered the other three-fourths to be paid into Court with liberty to the parties interested to apply.—*Loy v. Duckett*, C. & P. 305.

3. (*Parties—New orders.*) In a suit for administering the real estate of testator, the devisees of the real estate, subject to a power of sale given to trustees for payment of debts, are persons against whom "no direct relief" is prayed under the 23d of the New Order of August, 1841.—*Lloyd v. Lloyd*, Y. & C. 181.
4. (*Receiver "pendente lite."*) The rule of the Court is, that where probate has been actually granted and the contest in the Ecclesiastical Court is as to whether it shall be recalled, a receiver will not be granted except under special circumstances interfering with the power of the executor *de facto*; but where the contest is, which of two wills shall be proved, neither having been yet admitted to probate, the appointment of a receiver is almost of course, the question being, not whether there is a contest, but whether there is at the time a proper person to receive the assets.—*Rendall v. Rendall*, H. 152.

#### AGREEMENT.

(*Partly verbal, partly written—Part performance.*) A., tenant for a term of years of a house belonging to B. at a rent of 60*l.*, and tenant by the year of an adjoining field belonging to another person at a rent of 9*l.*, upon such field being purchased by B., agrees with B. to extend the house and premises over a part of such field, the expenses of the improvements being borne equally between them, and after the completion of the alterations signs a memorandum to the effect "that, in consideration of advances made to him by B. for the purpose of additions and improvements, the rent for the house and field should be raised from 69*l.* to 80*l.*:" Held, that the making of the alterations were, as acts of partial performance, sufficient evidence of an agreement affecting the whole of the field; that the written memorandum might be referred to in conjunction with these acts for the purpose of evidencing such agreement and ascertaining its terms, and that the effect of the whole together was to establish an agreement to annex the field to the house for the term during which the house was held, at the rent of 80*l.*—*Sutherland v. Briggs*, H. 26.

And see WILL, 10.

#### ANNUITY.

1. (*Conflicting annuities.*) The penal clauses of the Annuity Act apply to cases between prior and subsequent annuitants, as well as to those between annuitants and grantors.—*Searle v. Colt*, Y. & C. 36.
2. (*Remedy for arrears.*) A bill in equity may lie for the arrears of an annuity, though the plaintiff may have no right to have a security granted for its payment.—*Clifford v. Turrell*, Y. & C. 138.

And see STATUTE OF LIMITATIONS.

#### ASSIGNMENT.

(*Assignable interest—Retiring allowance.*) The commissioners of customs, under an authority given them by the Lords of the Treasury, granted to A., as a compensation for the loss of an office in the customs, 500*l.* a year, payable quarterly by the receiver-general of customs. A. assigned the allowance to B. for valuable consideration and subsequently took the benefit of the Insolvent Act, and under this act, 7 Geo. 4, c. 57, s. 29, some payments of the allowance were, with the consent of the board of customs, ordered by the Insolvent Court to be paid to the assignees. But this Court, in a suit by B. against the receiver-general and also A. and his assignees, restrained the receiver-general from paying over to the assignees the monies then in his hands on account of the

allowance, and intimated an opinion that the allowance itself, though revocable by the crown, was assignable.

The decision was affirmed by the Lord Chancellor, who relied particularly on the injunction being confined to the monies actually in the hands of the receiver-general.—*Tunstall v. Boothby*, S. 542.

#### CHARITY.

1. (*Cy-pres—Where one of several objects fails.*) Where one of several charitable objects contemplated in a will fails, in applying cy-pres the portion of the fund that is so released, the other objects provided for in the will are not to be preferred to others, if any can be found, more nearly akin to the object which has failed, though they may be looked at as affording some clue to the testator's probable intentions.

Accordingly where the testator gave the residue of his estate to one of the city companies upon trust to apply one moiety of the income in the redemption of British slaves in Turkey and Barbary, one-fourth to the support of schools in the city and suburbs of London, where the education was according to the Church of England, not giving to any one above 20*l.* a-year, and, in consideration of the trouble taken by the company, out of the other fourth, to pay 10*l.* to the clergyman who should officiate in their hospital, and the rest to be given to decayed freemen of the company: that part of the charity which related to the redemption of slaves having failed for want of objects, and there being no object to be found of a similar nature, the Court taking notice that the bequest which had so failed was for the benefit of British subjects in general, without regard to their place of birth or residence, and looking to the other objects contemplated in the will, to discover the sort of charity which the testator would have preferred, and the way in which he would have endowed it, declared that after setting apart a certain sum for the redemption of any British subjects who might thereafter be slaves in Turkey or Barbary, the income of the surplus of the moiety and its accumulations ought to be applied in supporting and assisting charity schools in England and Wales, where the education was according to the Church of England, but so that no more than 20*l.* should be given to any school.—*The Attorney-General v. The Ironmongers' Company*, C. & P. 208.

2. (*Reference—Intervention of third party.*) On a reference to approve of a scheme, the Master has no authority to allow a third party to intervene, who is not a party to the cause, though such intervention may on application be allowed by the Court.—S. C.
3. (*Relator.*) The attorney-general, and not the relator, is the only recognised party in an information; accordingly one cannot be heard against the other.—S. C.
4. (*Scheme without reference.*) In a very simple case, and the fund being small, 180*l.*, the Court directed a scheme without a reference.—*Attorney-General v. Brandreth*, Y. & C. 200.
5. (*Trust for parish.*) Held, that a bequest of a legacy, the interest to be paid to the poor of the parish of O., did not authorise payment of the legacy to a dispensary existing in O. for the benefit of that and other parishes.—S. C.

#### COPYRIGHT.

- (*Costs of suit to enforce.*) A plaintiff in a suit to restrain breach of a copyright and for an account, is entitled to an answer, not only with a view to the

account, but also for the purposes of establishing his title, if the action directed by the injunction should, by mutual arrangement, not have been tried; and he is entitled to have the costs of the suit including such answer, supposing it admits his title, though at the hearing he waives the account.—*Kelly v. Hooper*, Y. & C. 197.

### COSTS.

1. (*Appeal—Motion to elect.*) When such a motion, having been refused by the Vice Chancellor, was granted by the Lord Chancellor, his lordship refused to give the costs of the motion below; observing, his rule as to costs was to place the parties in the position they would have been in if the right order had been made at first, and the right order he thought would have been to grant the motion, making the costs costs in the cause.—*Royle v. Wynn*, C. & P. 252.
2. (*Dismissal—Plaintiff misled by wrong decision.*) After the report of the case *Flight v. Bentley*, 7 Sim. 149, and before it had been overruled by *Moore v. Choat*, 8 Sim. 508, a bill was filed expressly, as it appeared from the correspondence, on the authority of the former case, to charge an equitable mortgagee by deposit of a lease with a breach of the covenants in that lease. After issue joined, *Moore v. Choat* was decided, and shortly afterwards the report of it was published. The plaintiff, nevertheless, entered into evidence, and brought the case to a hearing; when the Court, after observing that the more proper course would have been for plaintiff to have had his bill dismissed on motion, as soon as he became aware of the late decision, nevertheless, but with some hesitation, dismissed the bill without costs.—*Robinson v. Rosher*, Y. & C. 7.
3. (*Jurisdiction.*) When a petition, not of rehearing, was presented to the Lord Chancellor, involving, though in a different shape, a question before raised before the Master of the Rolls, the Lord Chancellor, though deciding the point differently, held that he had no jurisdiction to impose upon the petitioner the terms of paying the costs of another similar petition at the Rolls, which the decision of the Lord Chancellor made unnecessary, but the petitioner paid them by consent.—*Saunders v. Vautier*, C. & P. 240.

And see COPYRIGHT; OFFICIAL ASSIGNEE.

### CROWN.

- (*Rights of—Equity of redemption.*) Where a person died intestate and without heirs, having made mortgages partly legal and partly equitable for more than the value of the estate: Held, nevertheless, that it could not be treated as a case of bare trust, under the 4 & 5 Will. 4, c. 23, s. 2, so as to deprive the crown of the equity of redemption, but that the estate should be sold on the administration of assets, with liberty to the purchaser to apply to the crown for a grant of the legal fee.—*Rogers v. Maule*, Y. & C. 4.

### DEBTOR AND CREDITOR.

- (*Appropriation of payment—Dividends in bankruptcy.*) When the obligee of a bond bearing interest had, under the bankruptcy of one of the obligors, received dividends amounting altogether to 20s. in the pound on the principal debt, he was allowed, in a suit to administer the estate of the co-obligor, to appropriate each successive dividend to the payment, in the first instance, of the arrear of interest due at the time of such dividend being made.—*Bower v. Marris*, C. & P. 351.

### DISCLAIMER.

- (*By answer.*) Where the defence to a suit for tithes was, that the plaintiff had



demised them to another party, who being then made a defendant, disclaimed by answer all interest in the tithes, and the execution of lease had not been actually proved in the cause, the Court, without inquiry as to that fact, decreed for the plaintiff.—*Mounsey v. Burnham*, H. 15.

And see MORTGAGE; OFFICIAL ASSIGNEE.

### ELECTION.

(*Principle as to.*) It is only where the proceeding at law is ancillary to the suit in equity, that the Court will allow the action to proceed without dismissing the bill, which it will in such a case retain in the meantime, whether the action be brought before the bill or after it, by direction of the Court. But where the action and the suit were substantially for the recovery of the same estate, though the suit was the more extensive of the two, in that it sought an account of rents and a delivery of title deeds: it was held to be a case of election.—*Royle v. Wynne*, C. & P. 252:

And see ESTOPPEL.

### EQUITABLE MORTGAGE.

(*Judgment creditor.*) *Quære*, whether the Court will interfere in favour of an equitable mortgage against a tenant by *elegit*, under a judgment subsequent to the mortgage, but obtained without notice of it.—*Whitworth v. Gaugain*, C. & P. 525.

### ESTOPPEL.

(*By same demand at law.*) Where plaintiff, who sued in equity for a legacy, had also brought an action at law against the executor upon a general account, including among other items the legacy claimed, and had in such action received 46*l.* by consent, in full for his demand; the Court, taking notice that the legacy was not of itself the subject of a legal demand, would not hold the plaintiff estopped, without first inquiring whether it had been taken into account on making out the balance actually paid.—*Holland v. Clark*, Y. & C. 151.

### EVIDENCE.

1. (*Admission—Identity and execution of deed.*) Where the parties in the cause agreed to admit certain facts in the same manner as if they had been proved by legal evidence, and among others, that a certain exhibit was a *notice given*, and a certain other exhibit a *true copy of the lease* referred to in such notice: Held, that this only went to substitute the copy for the original, and did not dispense with the necessity of proving the execution of the deed.—*Mounsey v. Burnham*, H. 15.
2. (*Admission of co-defendant.*) Admission by one defendant, who was the grantor of plaintiff's annuity, held no ground, as against the co-defendant grantee of subsequent annuity, for an inquiry with a view to account for the plaintiff's delay in filing bill.—*Searle v. Colt*, Y. & C. 36.
3. (*Competency.—Bankrupt mortgagor.*)—Bankrupt mortgagor is a competent witness for a party claiming an incumbrance prior to the plaintiff's mortgage, to show that the mortgagee had notice of such incumbrance, but he is not competent to prove that the mortgage was not usurious, as that might discharge his estate from liability to costs.—*Clarke v. Wilmot*, Y. & C. 55.
4. (*Competency.—Surety.*)—Surety on a joint and several promissory note is a

competent witness for the note creditor in a suit brought by him to administer the assets of the principal debtor.—*Wright v. Lockwood*, Y. & C. 113.

5. (*Foreign property—Suits relating to.*)—In a suit relating to real estate in Jamaica, an examined copy of a deed recorded and enrolled in the island, and by the law of the colony made evidence there, was admitted by the Court.—*Tullock v. Hartley*, Y. & C. 114.

6. (*Lost deed—Proof of loss.*)—As to what will be deemed sufficient evidence of the loss of an instrument to admit secondary evidence of its contents, see *Hart v. Hart*, H. 1.

N. B. The order in this case was for a reference to inquire what had become of the lost agreement, of which the existence at one time had been proved.

7. (*Lost deed.—Stamp.*)—Where secondary evidence is admitted of the contents of a lost instrument, it will be presumed that the instrument was duly stamped, unless there is evidence to the contrary.—S. C.

8. (*Payment of Mortgage money—Entries in attorney's book.*)—Entries in the books of the deceased attorney of defendant mortgagor admitted as evidence for the plaintiff in a foreclosure suit, to prove that the whole mortgage money had been paid, and that there was no usury, such entries being in the usual course of the attorney's business.—*Clark v. Wilmot*, Y. & C. 53.

9. (*Reading answer—Admission of assets.*)—Where executrix admitted in answer to a bill by a legatee that she had received assets, and she had thereout paid the legacy of the plaintiff among others, it was held that the plaintiff might read that part of the answer which admitted the assets, without the qualifying addition.—*Connop v. Hayward*, Y. & C. 33.

10. (*Reading answer to explain a document.*)—When a document in possession of defendant is produced at the hearing on the common order, founded on the admission of its possession, the defendant will not be allowed to read any part of his answer in explanation of such document, except as a ground for inquiry.—*Miller v. Gow*, Y. & C. 56.

11. (*Supplying defect—Administration suit.*)—When a judgment creditor in a suit against the executors and devisees, having obtained a decree *pro confesso* against the executors, prosecuted the suit against the devisees without any other evidence of the debt than an admission by the devisees of an examined copy of the judgment, the Court held the evidence defective, and, there having been want of due diligence in the plaintiffs, refused them leave to supply the defect.—*Marten v. Whichelo*, C. & P. 257.

INFANT. See PRACTICE, 27, 31 ; RELIGIOUS FAITH.

INJUNCTION.

1. (*Terms of granting.*)—An injunction restraining a party from enforcing a legal right, will not be granted without putting the party who asks for it on terms of trying that legal right without delay.—*Herman v. Jones*, M. & C. 299.

2. (*Same.*)—Same rule laid down in a case where the injunction granted by the Vice-Chancellor was on appeal dissolved on other grounds.—*Sanster v. Foster*, C. & P. 302.

And see PRACTICE.

INSOLVENT. See PARTIES; WILL, 9.

INTERPLEADER.

(*Connection of claims—Re-sale of estate.*)—A. being employed as auctioneer by B.

to sell an estate, sold it to C. who paid a deposit. A dispute as to the contract having afterwards arisen between B. and C., B. employed A. to resell the estate, which he did do to D., who also paid a deposit. B. then brought an action against A. for both the deposits, and C. afterwards filed a bill for specific performance against B., A., and D. Whereupon A. filed a bill of interpleader against B., C., and D.: Held that there was not sufficient connection between the claims to the two different deposits to entitle him to join the claimants in the same bill of interpleader, and the Court dismissed the bill as to D., preferring to retain C. because he was the first purchaser, and the case as to him was the most simple.—*Hoggart v. Cutts*, C. & P. 197.

#### JOINT STOCK COMPANY.

1. (*Action for call on share transferred.*)—A shareholder upon a call made transfers his share; and upon an action brought against him for the call, files his bill for an injunction, upon grounds impeaching the original right to make the call, but arising partly also from the fact of his having assigned his share, but did not make the transferee a party: Held, that the bill was defective for want of parties.—*Mangles v. Grand Collier Dock Company*, S. 519.
2. (*Cancellation of shares.*)—Where a clause in the deed of settlement of a joint stock company gave the directors a power of cancelling or selling in the market the shares of any proprietor in satisfaction of any debt due from such proprietor to the company; and under this power the directors cancelled 1000 shares of a proprietor who was in debt, for which they credited him with 10,000*l.* which was less than they would have produced according to the highest price on that day, but more probably than they would have actually sold for if brought at once into the market: Held, that the shares ought to have been valued according to the highest price, and the cancellation was accordingly set aside.—*Stubbs v. Lister*, Y. & C. 81.
3. (*Fraud in procuring act.*)—A bill filed by a shareholder to restrain an action against him for a call, stated, that in order to satisfy the standing orders of the House of Lords, by which a bill of this sort could not be brought in until three-fourths of the capital had been actually subscribed for, certain of the subscribers subscribed for additional shares enough to make up the deficiency, such deficiency being nearly twenty times the amount of the shares previously subscribed for; that a few days afterwards they signed a memorandum to the effect that they were trustees for the company of these additional shares, and that after the passing of the act these shares were, in pursuance of a resolution at a meeting of the proprietors, assigned to the secretary of the company. The bill further alleged that the directors by whom the call had been made were not duly appointed, as having been elected at meetings composed in great part of the holders of these additional shares, and which without them would not have been competent in point of number, but that the plaintiffs in equity were precluded from availing themselves of this as a defence to the action by a clause in the act, which provided that it should not be necessary in such an action to prove the appointment of the directors, or any other matter except the making of the calls. A demurrer for want of equity to this bill was allowed, partly because the Court would not presume the additional subscriptions, which had been virtually allowed by the House of Lords, were fraudulent and void, and partly because the matter stated in the bill might be used as a defence at law.—*Mangles v. Grand Collier Dock Company*, S. 519.

And see LACHES; PARTNERSHIP.

## JURISDICTION.

1. (*Certiorari.*) A common law judge has no right to order a certiorari to issue out of the Court of Chancery. But the Court has jurisdiction to issue a certiorari to the Court of Common Pleas of Lancaster to remove a cause from thence to the Common Pleas at Westminster.—*Worthington v. Remnant*, S. 558.
2. (*Estate in colonies—Boundaries.*) The Court has jurisdiction to settle the boundaries of real estate in Jamaica.—*Tullock v. Hartley*, Y. & C. 114.

## LACHES.

(*Relief against forfeiture of shares.*) Where the directors of a mining company had in 1828, acting upon the doubtful construction of a clause in the deed of settlement, declared the shares of the plaintiffs to be forfeited, for a refusal to contribute in an extraordinary manner to the necessities of the undertaking, which was then not prosperous, and the plaintiffs took then no steps beyond remonstrance, and shortly afterwards went to reside in Jersey, not leaving at any time the British dominions, and occasionally it seems coming to England, and in 1837, the mining concern being then prosperous, filed their bill for restoration of their shares, and alleging many acts of irregularity and misconduct on the part of the directors, which were admitted, the Court nevertheless, but with much hesitation, and after taking notice that it was a mining concern very uncertain in its returns, and required on the part of those engaged in it more than usual vigilance in asserting their rights, dismissed the bill.—*Prendergast v. Turton*, Y. & C. 98.

## LEASE.

1. (*Forfeiture—Conduct of lessee.*) Where a lessee comes into equity to be relieved from the forfeiture of his lease for non-payment, the lessor may rely in his defence upon other acts of misfeasance in the lessee unconnected with the payment of rent. In this case the objections not having been raised with sufficient distinctness by the pleadings, an issue was granted to the lessee to inquire into their truth.—*Bowser v. Colby*, H. 109.
2. (*Forfeiture—Payment into Court.*) A lessee coming into equity to be relieved from forfeiture of his lease need not generally pay into Court the costs of law and the arrears of rent, as these are only to be paid as the price of the redemption, supposing that he succeeds in the suit, and would be returned to him if he fails. But in this case he was, under circumstances of apparent loss to the lessor by pendency of the suit, ordered to pay such sums into Court, pending an issue as to the commission of certain breaches of covenant alleged against him by the lessor.—S. C.
3. (*Same.*) The provision of the 4 Geo. 2, c. 28, which requires that a lessee applying in equity to be relieved from a forfeiture incurred at law by non-payment of rent, should pay into Court the arrears of rent and the costs at law, within forty days after the answer is put in, does not apply to a case where no injunction is asked by the lessee and where the lessor is in possession.—S. C.
4. (*Forfeiture, void or voidable.*) Where the clause of re-entry for non-payment of rent was followed by a declaration that the lease should be void, the Court, upon the authority of *Arnsby v. Woodward*, 6 Barn. & Cress., held, that the lease in such a case was not void but only voidable even at law, and that therefore no objection to the relief asked arose from the clause in question; but the Court abstained from giving any opinion as to whether equity would

make any difference, as to relief from forfeiture, between a common clause of re-entry and a clause that the lease should be void.—S. C.

### LUNATIC.

1. (*Necessary supplies.*) A person furnishing necessary supplies to a de facto lunatic, not so found by commission, if it appears that he did not do it from charity, or upon the credit of another party, may prove for the amount as creditor against the lunatic's estate.—*Wentworth v. Tubb*, Y. & C. 171.
2. (*Right to traverse.*) The lunatic himself may, as a matter of right, traverse the commission, where at least there has been only one finding of a jury, but it is a matter of discretion with the Court whether they will make him an allowance to enable him to meet the expenses of the inquiry, and the Court will in the meanwhile treat him as a lunatic and see that proper precautions are continued for his safe custody. The Court in this case made an allowance though the lunacy appeared clear.—*Re Bridge*, C. & P. 358.

### MAINTENANCE.

- (*Settled fund—Ability of father.*) A father is not entitled to an allowance for maintenance of his children, if himself of ability, even out of the fund settled on the marriage, and subject to a power in the trustees to apply the income for maintenance, unless it clearly appears on the construction of the settlement, that the children were to be maintained out of that fund without reference to the ability of the father.—*Thompson v. Griffin*, C. & P. 317.

### MINING.

- (*Injunction.*) A copyholder having applied for an injunction to restrain the lord from working a mine which threatened to overturn his house, the Court, taking notice that the lord might by the custom of the manor have a right to work a mine even though it occasion the fall of the house, subject in that case to the liability of compensation, refused the injunction, on condition of the lord making certain admissions in an action to be brought by the defendant.—*Hilton v. The Earl of Granville*, C. & P. 283.

And see LACHES.

### MORTGAGE.

- (*Foreclosure—Disclaimer.*) If some of the defendants in a foreclosure suit disclaim, the Court will decree them to be foreclosed, and not simply dismiss the bill as against them.—*Perkin v. Stafford*, S. 562.

### NOTICE.

1. (*Constructive notice.*) A party, before advancing money on mortgage, was told by the mortgagor and his wife that there was a settlement on their marriage, but that it did not include such an estate, and a plausible reason was given for the unwillingness of the mortgagor to produce the settlement. It afterwards turned out that the settlement did include the estate, but it was held that the mortgagee had not constructively notice of that fact, and that having taken his mortgage by assignment of an antecedent term, he was entitled to hold his security discharged from the uses of the settlement.—*Jones v. Smith*, H. 43.
2. (*Priority—Inquiry.*) Notice to one of several trustees or holders of a fund of an assignment by the equitable owner of such fund, is sufficient to protect the assignee from any subsequent assignment, so long as the trustee to whom he has given notice is alive, as the subsequent assignee must, in order to acquire priority, have inquired of all the then trustees as to the existence of any prior as-

assignment. (See *Smith v. Smith*, 2 Crom. & Mee. 231; *Timson v. Ramsbottom*, 2 Keen, 35.)

It is not necessary that the notice should be given to the holder of the funds in that character, it is sufficient that he should have an actual enduring knowledge of the prior assignment when the later one was made. In this case one of the co-obligors of a bond was trustee of a settlement comprising the sum due on that bond, and this was considered sufficient notice to him.

*Semble*, that the subsequent assignee is not prejudiced by default in making inquiry, if by that inquiry he would have learnt nothing, but that in such a case he is, if he first gives notice, though not till after he has taken the assignment, to be preferred to the prior assignee.—*Meux v. Bell*, H. 73.

#### OFFICIAL ASSIGNEE.

(*Disclaimer.*) If an official assignee disclaims absolutely all interest, either by his answer or at the bar, the bill against him will be dismissed with costs. In this case the bankrupt was a mortgagor, and it was a bill to foreclose.—*Clark v. Wilmot*, Y. & C. 53.

#### PARENT AND CHILD.

(*Purchase in son's name.*) A father having purchased shares in a joint stock company, some in his own name, some in the name of his son, and having for some years paid the calls upon them, and there being admission by his son that the shares were not his, though he afterwards attempted to dispose of them by will: Held, that it was a trust for the father.—*Scawin v. Scawin*, Y. & C. 65.

#### PARTIES.

(*Insolvent—Bill of exchange.*) The assignees of an insolvent were held necessary parties to a bill by him to restrain an action against him on a bill drawn by him before insolvency and for a delivery up of such bill.—*Balls v. Strutt*, H. 146.

#### PARTNERSHIP.

(*Discovery—Partnership—Books.*) It is no sufficient excuse for a member of a partnership not giving a discovery, which he is bound to give if he can, and which is to be obtained from inspection of the partnership books, that his partners or, as in this case, his co-directors in a joint stock company, should refuse him access to the books.—*Taylor v. Rundell*, Y. & C. 128.

#### PERPETUITY.

(*Executory trust.*) Lord Le Despencer, being seised in fee of an ancient barony, conveyed real estates to trustees to the use of himself for life, remainder to the use of his eldest son for life, and then on trust to be settled, so far as the law would permit, so as to go along with the title, and so that during every suspension or abeyance of the same, within the limits prescribed by law for strict settlement, the rents should be equally divided among the co-heirs per stirpes of the person or persons by whose death or deaths without issue male the abeyance was occasioned, as by three counsel, of which the solicitor or attorney-general should be one, should be advised and directed. It was strongly contended that the general intention of the settlor being to create a perpetuity, the defect was not cured by the saving clause above stated, which was also found in *Tollemache v. Coventry*, 8 Bligh. N. S. 547. But the Court having suggested one way in which the intention of the settlor might be carried out within the legal limits, referred it to the master to approve of a settlement.—*Bankes v. Le Despencer*, S. 576.

And see WILL.

## PLEADING.

(*New case at hearing.*) Where an equitable mortgagee filed a bill against the mortgagor and tenants by elegit of the mortgaged premises, under a judgment subsequent to the mortgage, to enforce their security and for a receiver in the meanwhile, and the case was rested by the bill on alleged fraud and collusion between the mortgagor and the tenants by elegit, which case was not made out on the pleadings and affidavits, the Court would not allow the plaintiff at the hearing, until he had amended his bill, to rest his claim upon the supposed priority of an equitable mortgagee over a tenant by elegit in virtue of a creditor by a judgment subsequent to the mortgage, though without fraud and without notice of the mortgage.—*Whitworth v. Gaugain*, C. & P. 325.

## PRACTICE.

1. (*Amendment after replication.*) An affidavit by the solicitor of the plaintiff in support of a motion to amend after replication, stating generally that the proposed amendment is material, without showing in what way it is so, held insufficient. (See *Attorney-General v. The Fishmongers' Company*, 4 M. & C. 1.) —*Phillips v. Goding*, H. 40.
2. (*Amendment—Costs.*) Where the plaintiff after answer abandons by amendment part of the case made by the original bill, the application by the defendant for the costs occasioned by such abandoned part will be most properly made at the time, and it can only be made at the time of the hearing by special motion, when the amount of such particular costs will be material.—*Mounsey v. Burnham*, H. 15.
3. (*Contempt*) Where a defendant had, under an attachment for non-appearance, remained in custody long enough to be entitled to his discharge without paying the costs of his contempt, it was held that he could not be detained under an attachment subsequently issued against him for want of an answer.—*Lewis v. Evans*, C. & P. 264.
4. (*Decree nisi.*) A defendant who has allowed a decree nisi to be made absolute against him, by not appearing to show cause against it, cannot have the cause reheard except on special petition showing grounds for the indulgence.—*Booth v. Creswicks*, C. & P. 361.
5. (*Directing inquiries—Settled account.*) A settled account suggested by the answer, though not proved, held a sufficient ground for an inquiry.—*Connop v. Hayward*, Y. & C. 33.
6. (*Dismissal—Amendment.*) A plaintiff amended his bill not requiring an answer, one of the defendants however answered the amendment: Held, that he could not have the bill dismissed as against him for want of prosecution, until two months after filing his answer.—*Strickland v. Strickland*, S. 628.
7. (*Distribution of causes.*) Before the Order of May, 1837, came into operation, a cause was heard at the Rolls, and at the hearing on further directions a reference was directed; but exceptions taken to the report made on such reference were heard by the Vice Chancellor, who merely referred it back to the Master to review his report: Held, the new Orders being then in operation, that the cause was a Rolls' cause.—*Wilkins v. Stevens*, S. 617.
8. (*Same—Rehearing from fraud.*) Held, that the Vice Chancellor might hear a suit to set aside, on the ground of fraud, a decree made at the Rolls.—*Archer v. Slater*, S. 624.



9. (*Same—Transfer of fund.*) The Vice Chancellor has no jurisdiction, by the Orders of May, 1837, to order a fund standing in trust in a Lord Chancellor's cause to be transferred to a Rolls' cause.—*Wright v. Irving*, S. 625.
10. (*Distringas on stock.*) The Court gave an opinion, which was since carried into effect by the Order of 17th November, 1841, that, under the 5th section of the act, 5 Vict. c. 5, the officers of the Court ought to issue a distringas on their own authority, as the officers of the Court of Exchequer used to do.—*Exp. Field*, Y. & C. 1.
11. (*Impertinence—Schedule.*) A schedule that is improperly diffuse may be excepted to as impertinent, without pointing out the particular items in which it is excessive.—*Byde v. Musterman*, C. & P. 265.
12. (*Injunction—Affidavit of party.*) On a motion to extend an injunction for insufficiency in the answer, the affidavit of the plaintiff in equity *himself*, as to the materiality of the further discovery, will not be dispensed with, except upon very special grounds.—*Scotson v. Gawry*, H. 99.
13. (*Injunction—Exclusion—Delay.*) Where the action was commenced on the 11th of August, though the declaration was not delivered till the 28th of October, and the bill was filed on the 8th of November; the Court, considering that the plaintiff in equity must have known the subject of the action on the 11th of August, refused, on the ground of delay, though subsequent to the 28th of October there had been no laches, a motion made on the eve of trial to extend the injunction for a slight insufficiency in the answer.—S. C.
14. (*Injunction—Insufficient answer.*) In no case will the Court decide itself upon the insufficiency of an answer without exceptions filed, unless it be alleged that the answer is a palpable evasion; but on a motion to extend an injunction on the eve of trial, on the ground of insufficiency, the Court offered, if the plaintiff would file exceptions, to decide on them without a reference.—S. C.
15. (*Injunction—Notice—Clerk in court.*) The clerk in Court is the agent of a party in respect only of proceedings in the suit, and not for the purpose of receiving notice of an injunction. Such notice given to him is a nullity.—*Gooseman v. Dann*, S. 517.
16. (*Injunction—On amended bills.*) That part of the 10th Order of 1833 which provides, that in suits for common injunction, if the defendant do not plead, answer, or demur within eight days after appearance, the injunction shall be given on motion of course, applies to amended as well as original bills; and accordingly, eight days after amending his bill, plaintiff was held entitled, by the Lord Chancellor overruling the order of the Vice Chancellor, to an injunction without affidavit.—*Brooks v. Pinton*, C. & P. 233.
17. (*Interrogatory in Master's Office.*) The Master having, under the common decree in a creditor's suit, allowed an interrogatory for the examination of the administratrix, in very special terms, and as to points not suggested by the pleadings, the Court allowed generally an exception to such interrogatory.—*Hopkinson v. Bagster*, Y. & C. 13.
18. (*Irregular order.*) A party is not at liberty to disregard an order of the Court however clearly irregular it may be, though the Vice Chancellor held that he might; but the Lord Chancellor held the contrary, and also that the order itself was regular.—*Wilkins v. Stevens*, S. 617; (see *supra*, S. C. 7.)
19. (*Jurisdiction—Orders of 1837.*) Where the suit was by tenant in tail in re-

mainder to restrain waste and for an account of timber cut, and divers orders had been made in that suit for paying into Court the proceeds of such timber, such orders having been made at the Rolls, and the previous decree on further directions by the Lord Chancellor, but no liberty to apply was given either by the decree or the order: Held, that on the death of the tenant for life, the tenant for life might properly apply to the Vice Chancellor for payment out to him of the money in Court.—*Aburrow v. Aburrow*, S. 602.

20. (*New Orders—Master's report.*) Under the 48th Order of August, 1841, it is not sufficient for the Master to give a short description of the documents laid before him, and then to state his finding; but he ought to mention on which of these documents he proceeded, and to show on what parts thereof he grounded his finding.—*Re Grant*, S. 573.
21. (*Same—Previous suits.*) Leave to enter an appearance under the 8th Order of August, 1841, refused, where the subpoena had been served before they came into operation.—*Gregory v. Gregson*, H. 108.
22. (*Same.*) Leave to file a traversing note under the 21st Order refused where the subpoena had been served in May, 1841.—*Snell v. Crocker*, H. 108.
23. (*Same—21st and 22nd Order.*) Motion under 22nd Order to file a note under the 21st, requires affidavit of appearance entered.—*Trewick v. Turner*, Y. & C. 112.
24. (*Same—Proof of non-appearance.*) The absence of an appearance by defendant proved by affidavit that the deponent had been told by the clerk in court, and believed it to be true, that no appearance had been entered.—*Tatham v. Williams*, H. 159.
25. (*Same—Service of bill on defendant.*) It is not necessary, under the 23rd Order of August, 1841, that the copy of the bill served upon a defendant, from whom no answer is required, should be an office copy; an examined copy of the bill made before the filing was held sufficient, and upon proof of service of such copy, leave was given to make the entry in the Six Clerks' Office under the 24th Order: it was said by the Court, that service of a copy of that copy would have been sufficient, if required for other defendants.—*Blew v. Martin*, H. 150.
26. (*Same.*) On a motion under the 24th Order, the affidavit must show both the nature of the suit, and the mode of service.—*Haigh v. Dixon*, Y. & C. 180.
27. (*Same—Infant.*) The affidavit in such a case as the last should also state, at any rate upon information and belief, the party served was not an infant.—*Goodwin v. Bell*, Y. & C. 181.
28. (*Same—Sequestration.*) To obtain a writ of sequestration under the 9th Order, the affidavit must state, that the party suing out the writ of attachment believed that the defendant was in the county at the time of suing out the writ, and not merely resident in the county.—*Storer v. Great Western Railway Company*, Y. & C. 180.
29. (*Same—Service of subpoena.*) *Semhle*, it is necessary in application to enter an appearance for defendant under the 8th Order, that the affidavit of service of the subpoena should state that the memorandum required by the 14th Order was at the foot of such subpoena.—*Tatham v. Williams*, H. 159.
30. (*Same.*) The Court will use its discretion in dispensing with a strict ad-

herence to the terms of this Order, which is not imperative on the Court.—*Husham v. Dixon*, Y. & C. 203.

31. (*Same—Traversing note—Infant.*) The 21st Order of August, 1841, authorizing plaintiff to proceed against a defendant who does not plead, answer, or demur, on filing a traversing note, as described in the order, does not apply to the case of an infant defendant.—*Emery v. Newson*, S. 564.
32. (*Payment to solicitor.*) The Court refused to order payment to a solicitor, of 11l., the rule confining such payment to 10l.—*Hawkins v. Dodd*, H. 146.
33. (*Preliminary accounts.*) If on motion by plaintiff for taking preliminary accounts, under the 5th Order of May, 1839, the defendant objects that other parties ought to have been joined as plaintiffs, the Court will not make the order.—*Logan v. Baines*, S. 604.
34. (*Same.*) Where a bill filed by legatees stated the plaintiffs to have been intended by a description that did not precisely apply to them, and the answer of the executors did not show beyond a doubt that such must have been the case, the Court refused to direct a preliminary inquiry as to a fact on which the gift of the legacy, to whomsoever given, was made dependent.—*Wilson v. Applegarth*, S. 657.
35. (*Pro confesso.*) It appearing on a motion to take the bill *pro confesso* that the time allowed by the 1 Will. 4, c. 36, after the committal of the defendant, had elapsed in this case, the defendant was ordered to be discharged without paying the costs of his contempt, an order made by the Master of the Rolls with a view to taking the bill *pro confesso* being discharged, as clearly irregular.—*Collins v. Collyer*, C. & P. 262.
36. (*Rehearing—New exhibit.*) The rule excluding new evidence on a rehearing, except upon motion with notice, applies only to new depositions, and not to new exhibits, which may be proved *viva voce* on motion without notice.—*Herring v. Clobery*, C. & P. 251.
37. (*Scandal—Jurisdiction of Master.*) The Master's decision on a question of scandal or impertinence, brought before him under the 73rd Order of 1828, is not final, and ought therefore to be issued in the form of a certificate.—*Phipps v. Henderson*, S. 634.
38. (*Security for costs.*) Where plaintiff resident abroad makes default in giving security for costs, the Court will not order the bill to be dismissed, but the Court in such a case ordered an injunction obtained by the plaintiff to be dissolved, unless he should give security within four days.—*Fort v. The Bank of England*, S. 606.
39. (*Trustee of stock—11 Geo. 4 & 1 Will. 4, c. 60—Costs.*) An interest in part of the dividends of a sum of stock is sufficient to support a petition for the appointment of a new trustee.  
The proper order to be made under the 10th section is, for the dividends to be paid by the proper officer of the bank, not to the party beneficially entitled, but to the new trustee; and an order wrong in this respect having been obtained *ex parte*, a motion to enforce it against the bank was refused with costs.—*Re King*, S. 605.
40. (*Witness made defendant.*) Where a party had been made a defendant with the view of depriving the chief defendant of his evidence, and there was not case enough upon the other evidence for any further inquiry as against such

defendant, the bill was dismissed with costs as against both.—*Colman v. Orton*, C. & P. 304.

And see CHARITY.

#### PRESUMPTION OF DEATH.

1. (*Particular time.*) Where parties sailed from an island in the West Indies before the hurricane months, and were never again heard of, it was presumed, after the seven years from their being last seen had elapsed, that they died before the expiration of the period commonly known by the name of the hurricane months, that is, the period between the 1st of August and the 10th of January, and therefore before the 24th of January.—*Sillick v. Booth*, Y. & C. 117.
2. (*Priority of Death.*) Where two parties perish by the same event, as in a shipwreck, and nothing more is known as to which died first, the presumption of priority will be raised from the comparative age, health, and strength of the parties.—*Sillick v. Booth*, Y. & C. 121.

#### PRINCIPAL AND AGENT.

(*Costs in suit against agent.*) In such suits the Court will not, at the hearing, except in an extreme case, and not by reason only of non-delivery of accounts, direct payment of costs up to the hearing, but reserve them for further directions as in other cases.—*Jellicoe v. Price*, Y. & C. 74.

And see SPECIFIC PERFORMANCE, 1.

#### RECEIVER.

(*Joint appointment by mortgagor and mortgagee.*) A mortgagor tenant for life, and a mortgagee having a charge on his interest, and also in the reversion, join in the appointment of receiver, who was to apply the rents partly in payment of other charges as well as those of the mortgagee, but chiefly in payment of the interest on his incumbrance—mortgagee dies, and then mortgagor: Held, that receipt by executrix of the mortgagee of some payments from the receiver, after the death of the mortgagor, did not of itself constitute the receiver her agent, so as to make her responsible for his defaults, but that it was ground for inquiry, whether she had in fact adopted him as her agent.—*Jones v. Smith*, H. 43.

#### RELIGIOUS FAITH.

(*Education as Catholic.*) A father by will directed his son to be brought up in the Roman Catholic faith, and one of the three guardians whom he appointed was of that communion, the other two being the mother and her brother, who were both Protestants. The infant having been brought up chiefly with his Protestant relations, and educated in their faith till the age of fifteen, the Roman Catholic guardian then attempted to enforce the directions in the father's will, when the case being brought by petition before the Court, his Honour expressed his regret at the neglect of the father's wishes, but considering the bad effect upon the faith and moral character of the infant, which a change of religion at that time might work, he said he would see the infant, and ascertain the state of his mind, before he made any order.—*Witty v. Marshall*, Y. & C. 68.

#### SETTLEMENT.

(*Bankruptcy—Equitable set-off.*) On the marriage of A. with the daughter of B., A. and B. bound themselves, the first by covenant, the latter by bond, to pay each 5000*l.* to the trustees of the settlement, and the 5000*l.* coming from A.

was to be secured by an insurance on his life ; A. first became a bankrupt, and under his bankruptcy the trustees proved and received a dividend on his covenant ; B. afterwards purchased from A.'s assignees the whole of his interest in the settled fund, and having afterwards upon A.'s death received an amount of more than 5000*l.* on the policies on his life, invested it in stock. B. afterwards became bankrupt : Held, that his assignees were not entitled to the stock so purchased, except on paying to the trustees the amount due on B.'s bond, but *quære*, whether the trustees were not bound to repay to A.'s estate the amount received on their proof.—*Burridge v. Row*, Y. & C. 183.

#### SPECIFIC PERFORMANCE.

1. (*Agreement by agent contrary to intention of principal.*) It was held a ground for refusing specific performance of an agreement by defendant's agent to grant a lease, that such agreement was not, in regard to some restrictions on a particular sort of building, in conformity with the defendant's intentions, which intentions he had communicated to his agent, if he had authorized him at all, which was doubtful.—*Helsham v. Langley*, Y. & C. 175.
2. (*Parol agreement—Adding to deed by parol.*) Agreement to grant plaintiff an annuity, established on parol evidence, such agreement being denied by the answer, and though the assignment of lease and effects by plaintiff, which was alleged to have been in consideration of the agreement, purported to be made in consideration of money owing by plaintiff: that money, however, was not equal to the value of the property assigned, and the Court held, that it was no contradiction to the deed to prove a consideration in *addition* to the one stated. *Clifford v. Turrell*, Y. & C. 138.

#### STATUTE OF LIMITATIONS.

1. (*Acknowledgment of debt.*) An acknowledgment, in order to take a case out of the statute (3 & 4 Will. 4, c. 27), must appear to have been made with the intention of charging the party making it, and it must have been made to a party *then* entitled to make the demand. Accordingly, where the demand was against two executors for a legacy due to deceased wife of plaintiff, and the acknowledgment was made by one executor, with the object apparently of throwing the burden on the other, and it was made also before the plaintiff had entitled himself by taking out administration to his wife, it was held insufficient on both grounds.—*Holland v. Clark*, Y. & C. 151.
2. (*Annuitant out of possession.*) *Quære*, whether where an annuitant who has never been in possession claims to enforce his security the twenty years against him should not, under the 3 & 4 Will. 4, c. 27, begin to run from the date of the annuity deed, and not from the date of the last payment. In this case the deed was thirty years old, and no payment was proved at all, nor any alleged for the last fifteen years, and the Court dismissed the claim on the joint effect of laches and the statute.—*Searle v. Colt*, Y. & C. 36 ; (see ANNUITY, 2.)

#### VENDOR AND PURCHASER.

1. (*Acts of ownership as purchaser in possession.*) Such acts, as for instance a departure from the previous course of husbandry, may be a good ground for appointing a receiver or ordering payment into Court, but are no waiver of objections to title.—*Osborne v. Harvey*, Y. & C. 116.
2. (*Practice—Reference before hearing.*) The Court will not, in a vendor's suit for specific performance, grant a reference as to the title before hearing, if the defendant resists on other grounds but those of title, unless such grounds as set forth in the answer appear frivolous.—*Boyes v. Liddell*, Y. & C. 331.

**VOLUNTARY PAYMENT.**

(*Premium on policy—Lien.*) The voluntary payment of premiums confers on the payer no interest in the policy; but where the policy was a collateral security for money agreed to be settled by husband on his marriage, and after the husband's bankruptcy the wife paid the premiums out of her separate income, it was held that she had a lien on the proceeds of the policies for the amount so paid.—*Burridge v. Row*, Y. & C. 183.

**WATER-RIGHT.**

(*Old well.*) *Quære*, whether the owner of an old well can prevent his neighbour from sinking a well upon his own land, on the ground that the supply of water in the old well will be thereby cut off or diminished.—*Hammond v. Hall*, S. 551.

**WILL.**

1. (*Construction—After-born child—Gift per capita.*) Testatrix bequeathed residue to one for life, and then to be equally divided between her two nieces A. and B., and C. a third niece and her children. C. had eight children at the death of testatrix, and one born afterwards, during the life of tenant for life: Held, that all the children, including this one, took equally *per capita* with the nieces.—*Lenden v. Blackmore*, S. 626.
2. (*Construction—Annuity—Payable out of capital.*) Testator, after reciting that the income of his wife, in case she survived him, would consist in part of the rent of a leasehold estate which he had settled on her, directed his trustees, in case the lease should expire in her lifetime, to pay to her, out of the dividends and interest arising from a sufficient part of his personal estate, at their discretion, so much per annum as would be an equivalent for the rent lost thereby; and he gave his residuary personal estate to the trustees, in trust to invest it in the usual securities, and to accumulate the income until the lease should expire in his wife's lifetime, and then, during the remainder of her life, to pay her the income of the accumulated fund, and after her death to stand possessed of the capital for his grandchildren. The lease expired in the wife's lifetime, but the income of the residuary fund was not equivalent to the rent lost: Held, that the wife was entitled to have the deficiency of her income made good out of the capital of the residuary fund.—*Boyd v. Buckle*, S. 595.
3. (*Construction—Father and child.*) Held, that under a bequest to A. and his children, to be secured for their benefit, A. took for life with remainder to his children.—*Vaughan v. The Marquis of Headfort*, S. 639.
4. (*Construction—Leaseholds—Tenant for life.*) Testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, and in case he should die without issue, he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister. The testator died possessed of leasehold and also of real property: Held, that the widow was not entitled to the leasehold property in specie during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it.—*Benn v. Dixon*, S. 636.
5. (*Construction—Survivorship of accruing shares.*) Where a residue was given among four persons with survivorship between them, clearly given, as to the original shares, "and if but one survivor, the whole to such survivor:" this was held to mean survivorship of the accruing as well as original shares.—*Sillick v. Booth*, Y. & C. 121.

6. (*Construction—Vesting—Severance.*) Bequest of a particular stock upon trust to accumulate the dividends until A. attained twenty-five, and then to pay him over the whole : Held to give to A. an immediate vested interest, on the ground that the subject of the legacy was severed and set apart, although the trustees were also the executors, and on his attaining twenty-one the stock was ordered to be transferred to him.—*Saunders v. Vautier*, C. & P. 240. (See *infra* next case.)
7. (*Construction, same, “when or if.”*) Legacies to be paid to the legatees “when or if” they attained the age of twenty-one, but which were to be severed from the estate and set apart in trust for legatees, immediately on death of testator, and the legacy of each invested on a separate deed : Held, to be vested.—*Lister v. Bradley*, H. 10.
8. (*Copyhold—Jurisdiction.*) There is no case in which the Court has established a will of copyholds : *Semble*, the probate copy of a copyholder’s will is sufficient to lead the uses of a surrender to the use of his will.—*Archer v. Slater*, S. 624.
9. (*Insolvency—Gift over—Trust for insolvent.*) Where testator, after making a provision for his son, directed, that if he should attempt to alien, or do any act whereby it would be aliened, if it absolutely belonged to him, “then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife and child or children he might have, and for the education of such issue :” Held, that under this proviso the son did not take any such interest as would pass to his assignees on his bankruptcy.—*Godden v. Crowhurst*, S. 642.
10. (*Mutual wills.*) Two persons in 1799 sign and give to each other papers by which each charges his real and personal estate with 1000*l.* in favour of the other if he should survive him—each paper expressly referring to the other as its inducement. The parties never met afterwards, but many years afterwards a correspondence took place between them, in which each expressed a wish to abandon the agreement, and one of them sent back to the other his paper. Shortly afterwards both died : Held, that the estate of the survivor had certainly no equitable claim against that of the other, and the legal claim being doubtful, the bill was retained for twelve months, with liberty to bring an action.—*Ryan v. Daniel*, Y. & C. 60.
11. (*Perpetuity—Remoteness.*) Testator devised his reversion in fee, expectant on his decease without issue male, in his mansion house and estates at D. to his brother for life, with remainder to his first and other sons in tail male, with divers remainders over ; and he bequeathed his plate, pictures, &c. in and about his mansion house at D. to trustees, in trust to permit the same to be used and enjoyed by the person and persons who for the time being should be entitled to the possession of his mansion house under the settlement on his marriage, or the limitations contained in his will, until a tenant in tail of the age of twenty-one years should be in possession of his mansion house, and then the plate, pictures, &c. were to go and belong to such tenant in tail ; and he gave the residue of his personal estate to the person who at his decease would be beneficially entitled in possession to his mansion house. The testator’s brother had a son born at the date of the will, and both he and his son survived the testator : Held, that the trust declared of the plate, pictures, &c. was void



for remoteness, so far as it was intended to take effect after the death of the brother.—*Ibbetson v. Ibbetson*, S. 495.

12. (*Residuary gift—Apportionment of costs.*) Where a residue is given in certain proportions among certain persons, or classes of persons, the costs incurred by all parties in establishing their claims are to be paid out of the estate.—*Shuttleworth v. Howarth*, C. & P. 228.

13. (*Suppression—Inquiry.*) Where devisees showed that the will under which they claimed had existed, and was in the house of testatrix within two years before her death, during which time the defendant, who was the heir at law, with his family had been living in the house, and the defendant denied by his answer all knowledge of the will, but did not enter into any evidence of search: it was held that this was a case for inquiry, and the bill was retained, with liberty to plaintiff to bring action.—*Smith v. Spencer*, Y. & C. 75.

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#### APPEALS ON REPORTED CASES.

*Blewitt v. Roberts*, 10 Sim. 491 ; Law Mag. No. 55.—The decision of the Vice-Chancellor overruled, and the point settled, that an indefinite gift of an “*annuity*,” passes it only for life, but that an indefinite gift of the *interest* of personalty or of the dividend of stock passes the capital.—C. & P. 274.

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## BANKRUPTCY.

[Containing 1 Montagu, Deacon, and De Gex, Part 4.]

### ACT OF BANKRUPTCY.

1. (*Composition deed—Assent of creditor.*) A creditor who had assented generally to a composition deed was allowed to set up as an act of bankruptcy, such a deed containing a clause not before stated to him, providing for payment in full of the costs of bankrupt's solicitor in defending an action.—*Exp. and re Marshall*, 575.
2. (1 & 2 Vict. c. 110.) By the 8th section of this act a debtor is required, within twenty-one days after notice in writing by his creditor, to enter into a bond with two such sureties as a commissioner of the Court of Bankruptcy shall approve of, otherwise he shall be deemed to have committed an act of bankruptcy on the twenty-second day. Where the bond was duly executed by the debtor and his sureties within the twenty-one days, but the approval of the commissioners was not given till the twenty-third day, a fiat issued on the twenty-second day, was sustained.—*Exp. and re Goody*, 677.

### ANNULLING.

(*Fiat with improper object.*) Where the issuing of the fiat had been brought about by the contrivance and instigation of a creditor, with the apparent object of stopping a suit in Chancery against him by the bankrupt, and the petitioning creditor, though not participating in the object of such other creditor, had allowed himself to be made an instrument in his hands, concurring in the appointment as sole assignee of a mere creature of his, the fiat was annulled on the above grounds. *Exp. and re Kemp*, 657.

### APPOINTMENT OF ASSIGNEES.

(*Election in absence.*) It is a good practice for commissioners not to ratify the choice of assignees, except in the presence and with the assent of the persons chosen, but this is not essential to the legality of the appointment.—*Exp. Ackroyd, re Munroe*, 555.

### ASSIGNEE.

1. (*Petition by one assignee.*) When charges of fraud were brought against the solicitor to the fiat, which were not satisfactorily answered, the Court, on the petition of one of the assignees, ordered the solicitor to deliver up the proceedings, notwithstanding the other assignee would not consent but opposed the order.—*Exp. Randall, re Oakes*, 562.

And see Costs.

**BANKRUPT.**

1. (*Abroad—Surrender.*) The bankrupt being abroad when the fiat issued, was, by consent of creditors, allowed to petition to annul without surrendering.—*Exp. and re Chitty*, 682.
2. (*Surrender.*) A bankrupt can have only the common order for leave to surrender, notwithstanding it is his intention to dispute the fiat.—*Exp. and re Hobbins*, 657.
3. (*Surrender—Illness.*) Where the bankrupt has been prevented by illness from surrendering to the fiat, the Court will direct the commissioners to appoint such time as they shall think fit to take his surrender, the estate to bear the costs.—*Exp. Witham*, 624.

**BENEFIT SOCIETY.**

(*Priority—Acquiescence in breach of trust.*) The treasurer of a friendly society having a debt due to him from a person who offers a security, takes the security in the name of the society, and retains the amount of his debt out of the society's monies in his hands. Some time afterwards he becomes a bankrupt, having in the meanwhile debited himself annually in his accounts with the society, with the interest on the amount for which the security was taken. The security proves insufficient, and was not of the description or taken in the manner required by the Friendly Societies' Act: Held, that the omission on the part of the society to take steps for setting aside the transaction and calling in the money before the bankruptcy, did not deprive them of their statutory right to be paid in full before the other creditors.—*Exp. Burge, re Baker*, 540.

**COSTS.**

(*Taxation—Petition by one of several assignees.*) When one assignee presented a petition for taxation which was opposed by the other assignees, and upon taxation ordered and made, the bill was reduced more than one-sixth, and the costs of taxation paid to him by the solicitor as between party and party: Held, that he was entitled to his extra costs out of the estate, the Court refusing to entertain charges of personal feeling, as regarded the solicitor, which the other assignees brought against the petitioner.—*Exp. Fosbrooke, re Fisher*, 533.

**ELECTION.**

(*Claim "without prejudice"—Breach of trust.*) Where the bankrupt was one of three trustees, and the cestui que trusts had filed a bill against the three before the bankruptcy, for an account of stock misapplied, the Court on the authority of *Exp. Moody*, 2 *Rose*, 413, authorized the cestui que trust to enter upon the proceedings a claim for a specified sum "without prejudice to the Chancery suit," though the Court expressed a doubt as to the legal effect of those words.—*Exp. Stutely, re M'neill*, 643.

**EQUITABLE MORTGAGE.**

1. (*Covenant against assignment.*) Such a covenant, in a lease which had been deposited by way of security, held to be no bar to the usual order.—*Exp. Drake*, 539.
2. (*Memorandum in writing.*) A letter noticing that certain deeds have been deposited to secure a particular debt, together with a subsequent letter requesting further accommodation on the ground that the depositary holds ample security for the amount of the depositor's account: Held, to constitute a sufficiently definite memorandum in writing for the whole amount due.—*Exp. Corlett, re Edwards*, 688.

3. (*Partial deposit—Deed of partition.*) Held, that on a deposit of deeds by a joint tenant after partition, the omission of the partition deed, as it did not belong to him solely, did not impeach the security.—*Exp. Farley, re New*, 683.
4. (*Terms of deposit—Evidence verbal and written.*) Where the deposit having been originally with bankers for safe custody, the bankrupt had agreed with them verbally that they should hold the deed, in which he had then only an interest as joint tenant, for his general balance, and had afterwards promised by letter that he would, as soon as a partition had been effected, give them a security for the full amount; but when the partition was made, the memorandum accompanying the deposit which was then made, referred only to such advances as the bankers might make: Held, nevertheless, that the security covered the whole balance, whether made up of past or subsequent advances.—*Exp. Farley, re New*, 683.

#### EXPUNGING PROOF.

- (*Refunding dividends.*) It does not follow as of course, that because a proof is expunged the previous dividends are to be refunded; length of time since the proof, and also the nature of the claim, as if it was for a *bonâ fide* debt, held, upon reconsideration, to be barred by the statute, is to be considered.—*Exp. Wilson, re Bentley*, 586.

#### FIXTURES.

- (*Equitable mortgage—Subsequent fixtures.*) Trade fixtures removable as between landlord and tenant, as steam engines in a cotton mill, pass to equitable mortgagee by deposit of lease, and are not subject to the consequences of reputed ownership.

*Quære*, as to fixtures subsequently erected.—*Exp. Broadwood, re M'Neil*, 631.

#### JOINT AND SEPARATE ESTATE.

- (*Appointment of inspector.*) Where an inspector for the protection of the separate estate was ordered to be chosen by the separate creditors, the appointment of one who had been chosen was set aside, because one of the assignees and the solicitor to the fiat had taken an active part in his favour at the election, and a creditor, having also a mortgage on the joint estate, was allowed to vote.—*Exp. Wilson, re Manley*, 636.

#### JOINT STOCK COMPANY.

1. (*Proof against shareholder.*) A joint stock company may prove against the estate of a bankrupt shareholder, although they are at the time indebted to other parties to a considerable amount, and though the estate of the shareholder is liable to such parties.—*Exp. Davidson, re Caldecott*, 648.
2. (*Vote by public officer.*) The public officer may vote by attornies on behalf of the company in the choice of assignees.—*Exp. Ackroyd, re Monroe*, 555.

#### LIEN.

- (*Unpaid purchase money.*) A quantity of tea is sold at a price, which is to be paid at a future day. After the day has elapsed, the purchaser pays a sum on account, and writes to the vendors, who have retained the warrants in their possession, requesting them to wait the arrival of the overland mail, and on its receipt to dispose of the tea. He afterwards becomes bankrupt: Held,
1. That the vendors have a lien on the tea for the unpaid purchase money;
  2. That an application to the Court for an order for sale is not improper or un-

necessary; and 3. That the letter is a sufficient memorandum to entitle the vendors to costs.—*Exp. Twining, re Coles*, 691.

## MORTGAGE.

(*Assignment—Amount due.*) Held, that the assignee of a mortgage made in the first instance to secure what might be due on a current account, could not have an order for sale without a previous inquiry as to what was due on the original mortgage.—*Exp. Mackay, re Wright*, 550.

## ORDER AND DISPOSITION.

(*Assignment of mortgage—Notice to mortgagor.*) It is not necessary that the assignee of a mortgage should give notice of the assignment to the mortgagor, in order to take the security out of the order and disposition of the original mortgagee.—*S. C.*

## PRACTICE.

1. (*Direction of fiat.*) Direction changed from country to London, the petitioning creditor, the witnesses, and the majority of creditors residing in the latter place.—*Exp. Morrison, re Dunn*, 635.
2. (*Payment into bank.*) The provision that the official assignee shall pay and transfer forthwith into the bank all monies and securities, was dispensed with, on the petition of all the assignees, as to certain securities which could not conveniently be made available, unless they remained in the hands of the official assignee.—*Exp. Barnewall, re Biddulph*, 537.
3. (*Vivâ voce evidence.*) An order for a petition to be heard on evidence vivâ voce is not irregular, though obtained ex parte, it being in the nature of a rule to show cause, and it was held to be no sufficient reason for discharging such an order, that the petition had been already heard on affidavits, when the Court being equally divided in opinion, no order was made.—*Exp. and re Ely*, 547.

## PROOF.

1. (*Evidence of Debt.*) Where the bankrupt had absconded to America, and the Commissioners had expunged the proof of a debt, relying chiefly on the evidence afforded by the entries in the bankrupt's books, the proof was ordered to be restored, as evidence of this description ought not to have countervailed the oath of the petitioner.—*Exp. Boler, re Byron*, 602.
2. (*Joint or separate estate.*) Although a joint creditor who sues out a separate fiat will generally be allowed to prove his joint debt against the separate estate, he will not be so, if he has also a separate debt due to him, sufficient of itself to support the fiat.—*Exp. Barnett, re Blake*, 608.

N.B. An appeal from this decision is now pending before the Lord Chancellor.

3. (*Legacy—Subject to account.*) Where legatee in an administration suit had obtained a decree for account, and had also an order made on motion, for payment into Court of the amount claimed: Held, that he could not prove for the amount mentioned in the order, but only for such sum as he could prove to be due to him before the Commissioners.—*Exp. Lawden, re Standley*, 583.
4. (*Security.*) A creditor who has taken an assignment as a security cannot, without giving it up, prove on a promissory note, of which the consideration is made up in part of the arrears of interest on debt secured.—*Exp. Clark, re Clark*, 622.

## STATUTE OF LIMITATIONS.

(*Acknowledgment—Bill of exchange.*) Bill given in consideration of advance of money made more than six years ago, held to be an acknowledgment within the meaning of the 9 Geo. 4, c. 14, s. 1. (*Jones v. Ryder*, 4 Mee. & W. 32, explained.)—*Exp. Wilson, re Bentley*, 586.

## STOCK.

(*Trust stock.*) It is quite clear, that the stock held in trust by the bankrupt is not subject to the consequences of reputed ownership, the reason being that the bank will not take notice of trusts.—*Exp. Witham, re Biddulph*, 624.

## TRUST.

1. (*Latent trust—Possible debts.*) Where the bankrupt was entitled by reversionary bequest to the residue of a testator who had died forty years ago, and they were also the executors, it was held, on such reversion falling in, that the probability of there being any outstanding demands against the testator's estate did not create a sufficient trust affecting the residue to raise a valid objection against the sale, and the bankrupts were ordered to concur in it.—*Exp. Bolton, re Moxon*, 667.

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PRIVY COUNCIL.

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[Containing 3 Knapp, Part 3.]  
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## COLONIAL GOVERNOR.

(*Powers of.*) The governor of a crown colony has not vested in him, by the force of his appointment, the whole of the power residing in the crown, but such portion only as is expressly delegated by the terms of his commission, or by subsequent instruction, unless such delegation can be implied from its necessity; accordingly it was held that the governor of Berbice, in the absence of such circumstances, had not the power to reduce the commission of five per cent. to which the vender master was entitled upon all sales in the colony, and that the absence of any objection by the crown did not amount to an affirmation by acquiescence, though it was admitted that the crown might have reduced or annulled such commission by order in council.—*Cameron v. Kyte*, K. 332.

## DEBTOR AND CREDITOR.

(*Payment—Appropriation—Provost Marshal's books.*) The entry by creditor in the books of the provost marshal of St. Vincent, though according to the law of that island conclusive evidence of payment, and though made twenty-three years ago, without being questioned in the meanwhile, was held to be not so as to the appropriation of the sum, against a receipt previously given, admitting the sum to be paid upon a different account from that stated in the entry, the receipt referring the payment to the separate account of the debtor, the entry

to a joint account on which he was liable together with others.—*Fraser v. Birch*, K. 380.

#### GUERNSEY.

(*Royal court—Ordinance—Poor-rate.*) Held, that the power of the royal court in Guernsey to make regulations for the carrying out of the laws, authorized them, under a law for raising a poor-rate, to make an ordinance subjecting to the rate stock in the English funds belonging to parties resident in the island. —*Tupper v. The Treasurer of the Hospital of St. Peter Port*, K. 412.

#### JURISDICTION.

(*Plea by alleged foreigner.*) Held, that a plea to the jurisdiction of the Recorder's Court of Bombay by a Hindoo, stating that he was a native of Arcot, resident at Serroon, within the dominions of the Peishwa, was defective, because it did not point out any other Court of competent jurisdiction to try the offence.—*Pooneakhoty Moodeliar and the King*, K. 348.

#### MARRIAGE.

(*Foreign law—Fraudulent abjuration.*) Assuming, what was not clearly proved, that, according to the laws of Rome, foreigners who had been previously Protestants could not be married without first abjuring the Protestant faith, it was held in the Privy Council, reversing the judgment of Sir J. Nicholl in the Arches, that an abjuration by one of the parties, made two days previous, and by the other party, who was the lady, and a minor, immediately before the ceremony, was a sufficient compliance with the requisition of the Roman law, though the parties very shortly afterwards returned openly to the communion of the Protestant Church, and had never publicly renounced it, and though the opinions of Roman lawyers were conflicting as to the sufficiency of such an abjuration, assuming it to be feigned, and for the purposes only of the marriage. The wife, who repudiated the marriage, *endeavoured* also to show that she was not aware at the time, that she was going through the ceremony, but thought she was only renewing a promise which she had made; and another point was whether the priest, not being the parish priest, was competent by the Roman law to perform the ceremony, which it was held he was.—*Swift v. Kelly*, K. 257; *Swift v. Swift*, K. 303.

#### PRACTICE.

(*Acquiescence of counsel—Peremption of appeal.*) Where counsel, who had been engaged at the hearing, appeared again upon the reserved question of costs, without fresh instructions, and took part in the proceedings, without any objection being made by the proctor who originally instructed him, and who was then present, and the counsel on that occasion assented to a final decree being made; Held, that this was binding on the party, and took away the right of appeal.—*The Ship Clifton*, K. 375.

#### VENUE.

(*Completion of the offence—Uttering.*) An Hindoo merchant employed in the commissariat department of the Bombay army, within the territories of the Peishwa, having knowingly transmitted to Bombay a forged receipt for charges incurred, which receipt was accordingly entered in the commissariat account at Bombay, it was held that the uttering, being the completion of the offence, the case was properly tried in the Recorder's Court of Bombay.—*Pooneakhoty Moodeliar and the King*, K. 348.



## HOUSE OF LORDS.

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[Containing 5 Clark and Finnelly, Part 5, omitting cases mentioned in former digest.]

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### PEERAGE.

1. (*Abeyance—Notice of claim.*) The claimant of a peerage in abeyance is bound to give notice of his claim to all the co-heirs known to him to be in existence, and notice by letter through the post-office is not sufficient.—*The Camoys Peerage*, 789.
  2. (*Attainder—Restoration in blood only.*) Where one of two co-heirs was attainted, and his son and heir was restored in blood only, expressly excepting honours and hereditament: Held, that it was competent to the crown to terminate the abeyance in favour of such heirs, or any of his heirs.—*S. C.*
  3. (*Attainder of co-heir.*) It is now established, that an attainder of one co-heir of a barony in abeyance, does not affect the other co heirs who do not derive through the attainted person.—*S. C.*
  4. (*Same.*) Same point decided the same way.—*Beaumont Peerage*, 868.
  5. (*Evidence—Inscription on portrait.*) Inscription on a portrait produced from the custody of a family connected by marriage with that to which the peerage claimed once belonged, admitted as evidence of pedigree.—*The Camoys Peerage*, 789.
  6. (*Evidence—Records of previous claim.*) Minutes of proceedings of committee of privileges, to whom a claim to a barony in abeyance had been referred, allowed to be given in evidence.—*Beaumont Peerage*, 868.
  7. (*Practice—Co-heirs—Watching evidence.*) Co-heirs to a peerage in abeyance allowed, on petition to the house, to appear by counsel, before the committee of privileges, to watch the evidence on behalf of a claimant, without themselves claiming.—*The Camoys Peerage*, 789.
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## ABSTRACT OF PUBLIC GENERAL STATUTES.

(5 VICT. SESS. 2.)

**CAP. 1.**—An Act to provide for the Application to the Service of the Year One thousand eight hundred and forty-one of the Sums granted in the two last Sessions of Parliament. [15th February, 1842.]

**CAP. 2.** An Act to enable his Royal Highness Albert Edward, Prince of Wales, to make Leases and Grants of Land and Hereditaments, parcel of his said Royal Highness's Duchy of Cornwall, or annexed to the same; and for the other Purposes therein mentioned. [15th March 1842.]

**CAP. 3.** An Act to confirm an Act of the Legislature of Van Diemen's Land, for authorizing the Levy of certain Duties of Customs, and on Spirits. [15th March, 1842.]

**CAP. 4.** An Act to provide for the Increase of the number of Bishoprics and Archdeaconries in the West Indies, and to amend the several Acts relating thereto. [23d March, 1842.]

**CAP. 5.** An Act to continue to the First Day of August, One thousand eight hundred and forty-three, the Act to amend the Laws relating to Loan Societies. [23d March, 1842.]

The Act 3 & 4 Vict. c. 110, further continued to 1st August, 1843.

**CAP. 6.** An Act to amend an Act of her present Majesty for vacating any Presentment for rebuilding the Gaol of Newgate in Dublin, and any Contract between the Commissioners for rebuilding the said Gaol and the Contractor. [23d March, 1842.]

**CAP. 7.** An Act to explain the Acts for the better Regulation of Apprentices. [23d March, 1842.]

S. 1. The provisions of the Acts 20 Geo. 2, c. 19, 33 Geo. 3, c. 55, 4 Geo. 4, c. 29, and 32 Geo. 3, c. 57, to extend to Apprentices with whom no premium has been or shall be paid.

S. 2. Act may be amended or repealed this Session.

**CAP. 8.** An Act to apply the Sum of Eight Millions out of the Consolidated Fund to the Service of the year One thousand eight hundred and forty-two. [23d March, 1842.]

## EVENTS OF THE QUARTER.

A MORE than ordinary number of new Bills affecting the practice or profession of the law, have been brought in or announced within the last three months. The most important are : the Lord Chancellor's Bills for the improvement of Lunacy and Bankruptcy proceedings, Lord Cottenham's and Lord Brougham's Local Court schemes, Lord Campbell's relating to the supreme Appellate Jurisdiction, and Lord Denman's for removing the Incapacity of Witnesses.

Lord Campbell's Bills, and the Lord Chancellor's Bankruptcy Bill, are mentioned in the body of this work. The Lunacy Bill requires only a few modifications to render it a judicious remedy for evils which have at length grown to an intolerable height. In fact, a small estate is nearly eaten up in the course of the proceedings adopted for its preservation, and the order for maintenance is hardly ever arrived at within a year. Lord Denman's Bill is one of those quiet but highly beneficial alterations, which we shall soon be justified in expecting periodically from him. The rule of English law, which utterly incapacitates a witness who has the smallest pecuniary interest in the result, whilst the nearest relatives may give evidence for one another, has long been regarded as a strange anomaly, and more than one statute has been passed to modify it. Lord Denman now proposes that no witness shall be incapacitated on account of either interest or crime ; it being left to the tribunal to make the fitting deduction from credibility.

We have stated over and over again our objections to any sort of local court scheme, tending to impair the principle of centralisation, which alone enables this country to go on without a code ; and the necessity for provincial establishments is daily becoming less pressing, since the furthest extremity of the kingdom will soon be brought within a few hours' journey of the metropolis. If the judicial force be not sufficient, add to it ; but, as has been judiciously suggested by Mr. Dax, there seems no good reason why a fresh division of labour should not be first attempted in the Courts of Common Law, where four judges are constantly occupied about matters not more important than are satisfactorily disposed of in the courts of equity by one. In reforms of this kind, it should always be remembered, that the persons duly qualified for the bench at any given time are few, and that number fatally diminishes responsibility. Lord Brougham proposes, as he proposed eight years ago, to begin by trying the experiment of a local court in a single county. Does it follow that because we could get one good judge for such a purpose, we could get forty ? This is like arguing that because we can get corn at 28s. a quarter at Odessa now, we could get enough for the entire consumption of Great Britain at the same price.

" The Times " thinks some good might be effected by curtailing the speeches of counsel ; and it must be admitted that a great deal of time is wasted by the prevalent habit of prolixity. The gentlemen most famous for this quality forget, that, although they, after a laborious study of their cases, may see the bearing of each individual fact or argument, judges and juries necessarily confine themselves to one or two of the most striking. A friend who had examined several of Erskine's briefs, assured us that he generally found the statements bearing on the principal point strongly dashed, and hardly ever so much as a mark to call attention to the rest. A succession of judges like Lords Kenyon, Ellenborough, and Tenterden, had also a powerful influence in checking prolixity. But we must not be too hasty in drawing inferences from the number of causes dispatched by them ; for (mostly

through the operation of the new rules) a much smaller number of trifling or simple causes now find their way into the cause list, and the causes which are tried are tried more carefully.

In the Courts of Equity, the arrears of causes ready for hearing have been greatly reduced by the new Vice-Chancellors, as was anticipated, but the Masters' offices will soon be choked up, and complaints of the dilatory nature of Chancery proceedings be then as loud as ever.

A most absurd motion was recently made by Mr. Wason, relying probably on the growing prejudice against the profession. No counsel was to be retained before more than one committee at a time;—as if Mr. Wason might not have got barristers by the dozen ready to give exclusive attention to his case, if he chose to dispense with reputation and experience in this particular walk of practice. From the tone adopted by this gentleman, any one would suppose that people were obliged to retain the leaders of the bar, or that the leaders of the bar were not entitled to derive the full profit from their success. The plain answer to all such complaints is, that the public have the remedy in their own hands, whenever they think proper to exercise it. The most sensible remark was that made by Mr. O'Connell, that, when he retained counsel of eminence, he knew very well that he must take his chance of occasional absence, and had consequently no reason to complain.

The Copyright Bill has been introduced by Lord Mahon in a speech of judgment and ability, and is expected to pass, though in a somewhat mutilated condition.

Considerable alarm has been excited by a Bill relating to members of the King's Inns, Dublin, in which it is enacted, that members of those Inns, who have kept eight Terms, shall be qualified to practise as conveyancers and special pleaders. We have always been of opinion that certificated conveyancers should be abolished, and the proposed recruits are not likely to elevate the calling. It seems clear, however, that this part of the measure must be given up.

It is rumoured that the revising barristers are to be greatly reduced in number, and paid upon a new principle. Each is to have a district to himself, and to be paid a fixed sum for revising it, choosing his own time and paying his own expenses. It is added, that all are to be paid alike, but this is hardly credible. Still, if no confidence is to be placed in the barristers' estimate, we do not see how the remuneration can be proportioned to the work. The period within which the duty is to be performed will probably be enlarged.

## LIST OF NEW PUBLICATIONS.

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